

<b>WTC Tower 1 LLC v VS 125 LLC</b>
2021 NY Slip Op 30240(U)
January 27, 2021
Supreme Court, New York County
Docket Number: 161891/2019
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM**

*Justice*

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**INDEX NO. 161891/2019**

WTC TOWER 1 LLC

**MOTION SEQ. NO. 001**

Plaintiff,

- v -

VS 125 LLC,

**DECISION + ORDER  
ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff commenced this action, pursuant to a summons and complaint dated December 9, 2019, seeking damages based on breach of the parties' lease after plaintiff had obtained possession of the subject premises in a summary holdover proceeding.

The complaint asserts two causes of action. The first is for damages based on breach of lease for failure to pay rent, additional rent, and costs "associated with restoring the Premises," which plaintiff alleges "have not yet been determined but are anticipated to be in an amount not less than \$600,000.00." The second cause of action seeks attorneys' fees incurred in this action as well as in the related summary holdover proceeding.

Defendant appeared by counsel and filed an answer asserting ten affirmative defenses and a counterclaim on January 31, 2020. The defenses asserted in the answer include failure to state a cause of action, bad faith, laches, waiver, equitable estoppel, that plaintiff breached the lease, that plaintiff had drawn down on a letter of credit in the amount of \$1,125,880.00, expiration of the statute of limitations, parole evidence, and unclean hands. The counterclaim is for \$241,260

allegedly due from plaintiff as a “work allowance” pursuant to the lease for alterations defendant made to the subject premises.

Plaintiff moves for summary judgment as to liability on its first and second causes of action, and dismissal of defendant’s affirmative defenses and counterclaim.

### **ALLEGED FACTS**

Plaintiff is the landlord of the building located at One World Trade Center in Manhattan (the “building”). Defendant is a former tenant of a portion of the 84th floor of the building, pursuant to a lease dated December 14, 2015. The lease is for a term through June 30, 2021. In July 2016, the building was awarded Leadership in Energy and Environmental Designs (LEED) Gold Certification.

Defendant used the subject premises as a real estate office and a model condominium showroom for prospective purchasers of condominium apartments being constructed at a nearby site at 125 Greenwich Street. The “build out” of defendant’s showroom included a kitchen, bathrooms, and bedrooms. All plans for the build out were approved by plaintiff and subject to any changes that plaintiff requested. After the plaintiff’s initial approval of the plans, plaintiff’s agents remained involved at all stages of the build out.

The cost of defendant’s build out exceeded \$311,222.00. The lease provided that plaintiff would contribute \$241,260 towards the cost of said work, but plaintiff never made any such payment. Plaintiff asserts that a condition precedent of this work allowance payment was LEEDS compliance, which plaintiff asserts defendant failed to achieve.

In May 2019, defendant defaulted on the terms of the lease by failing to pay the monthly rent. Plaintiff commenced a summary holdover proceeding against defendant in Civil Court under Index number 67274/19. The parties entered into a stipulation of settlement in the summary

proceeding that resolved the issue of possession, but reserved their respective rights and defenses as to any monetary claims. As of the date the motion papers were submitted, the subject premises had not been re-rented.

### **DISCUSSION**

“The proponent of a summary judgment motion 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.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). “Once this showing has been made... 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.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

#### ***Plaintiff’s Motion for Summary Judgment on its Two Causes of Action***

Plaintiff’s first cause of action seeks damages for unpaid rent and restoration costs of the surrendered premises. It is undisputed that defendant is liable for the monthly rent under the lease. However, there are questions of fact regarding the amount of rent that remains unpaid; such as issues related to the alleged draw down of the letter of credit. Additionally, there are issues of fact concerning the “estimated” \$600,000.00 in costs to restore the subject premises. Accordingly, summary judgment on plaintiff’s first cause of action is denied.

Similarly, while plaintiff was the prevailing party in the summary holdover proceeding and entitled to fees for same, it is premature to make a determination on plaintiff’s claim for fees in this instant action. Accordingly, summary judgment on plaintiff’s second cause of action is denied.

***Plaintiff's Motion Seeking Dismissal of Defendant's Affirmative Defenses***

Plaintiff argues that the affirmative defenses should be dismissed as they are insufficiently plead and without merit. CPLR § 3013 provides:

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

N.Y. C.P.L.R. 3013 (McKinney)

The motion to dismiss the first defense of failure to state a cause of action is denied. The defense of failure to state a cause of action is not subject to dismissal, since it may be raised at any point, even if not plead in the answer. *Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 353 (1977).

The following defenses, however, are insufficiently pled in one line sentences in the answer, and dismissal of said defenses is not opposed in defendant's opposition papers: the second affirmative defense alleging bad faith, fraud, and misrepresentation; the fourth affirmative defense alleging inequitable or wrongful conduct; the seventh affirmative defense asserting statute of limitations; the eighth affirmative defense alleging the claims are barred by the parole evidence rule; and the ninth affirmative defense alleging unclean hands. Accordingly, dismissal of these defenses is granted.

The fifth affirmative defense alleges that plaintiff also breached the lease. Specifically, in the motion papers it is alleged that plaintiff was required to provide notification to defendant upon receiving the LEEDS certification in order to trigger further obligations by defendant to receive the payment from plaintiff on defendant's build out. The parties allege different facts as to whether said notification was provided. This presents an question of fact to be determined at trial.

The sixth affirmative defenses alleges that plaintiff failed to credit defendant \$1,125,880.00, which it received when it drew down on a letter of credit defendant had deposited pursuant to the lapse. The parties disagree as to whether said sum has been credited. This presents a question of fact to be determined at trial.

Finally, the tenth affirmative defense alleges that plaintiff's claims are barred in part by the terms of the lease. As discussed above there are questions of fact as to whether portions of plaintiff's claims are barred by the lease; for example, the issue of whether defendant's build out was "extraordinary."

***Plaintiff's Motion Seeking Dismissal of Defendant's Counterclaim***

Defendant raises triable issues of fact sufficient to preclude dismissal of its counterclaim. For instance, that plaintiff knew of the work being done by defendant, that plaintiff was involved in all phases of the build out, and that plaintiff failed to raise any objections regarding LEEDS compliance or assert at the time that the alternations were extraordinary in nature. Accordingly, summary judgment dismissing defendant's counterclaim is denied.

**CONCLUSION**

Plaintiff's motion is granted to the extent of dismissing the second, fourth, seventh, eighth and ninth affirmative defenses and is otherwise denied.

This constitutes the decision and order of the Court.

1/27/2020  
DATE

  
JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE