

<b>Eldad Prime LLC v Gary Ostrow, D.O., P.C.</b>
2021 NY Slip Op 31307(U)
April 19, 2021
Supreme Court, New York County
Docket Number: 150526/2021
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<b>PRESENT:</b>	<b><u>HON. LAURENCE L. LOVE</u></b>	<b>PART</b>	<b>IAS MOTION 63M</b>
	<i>Justice</i>		
-----X		<b>INDEX NO.</b>	<u>150526/2021</u>
ELDAD PRIME LLC		<b>MOTION DATE</b>	<u>03/26/2021</u>
Plaintiff,		<b>MOTION SEQ. NO.</b>	<u>001</u>

- v -

GARY OSTROW, D.O., P.C.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22 were read on this motion to/for DISMISS.

The following read on defendant’s motion to dismiss the complaint, per CPLR 3211(a)(1)(2)(5) and (7), in this breach of lease agreement for a doctor’s office at 115 East 57th Street, 16th floor, New York, New York, 10022 (“premises”), for the sum of \$594,805.36.

Plaintiff’s causes of action are: i) breach of lease for fixed rent and additional rent, ii) subsequent accruing fixed rent and additional rent, iii) declaratory judgment per CPLR 3001, iv) order of ejectment, and v) costs, expenses, including legal fees.

A summons and complaint were filed with the Clerk of the court on January 15, 2021, and defendant filed this pre-answer motion to dismiss on February 18, 2021.

On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff’s allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168

A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

Plaintiff is the owner and landlord of the premises and defendant is a commercial tenant that occupies the entire sixteenth (16) floor. Per plaintiff's attorney affirmation, "[d]efendant entered into possession of the premises pursuant to an agreement of lease made as of October 15, 2012. Pursuant to the terms of the lease, defendant would use and occupy the premises as a general and executive office for the practice of medicine for a period of sixteen (16) years, commencing October 15, 2012 through and including October 15, 2028. Defendant was obligated to pay \$48,280 per month" (see NYSCEF Doc. No. 1 Par. 7 -8). Neither party provides the lease agreement as an exhibit.

Plaintiff's affirmation continues, "[d]efendant has failed to pay ... rent and additional rent which have come due and owing for the period of May 1, 2019, through and including January 31, 2021. Plaintiff advises defendant of the same by service of a notice of default, dated December 10, 2020. When defendant failed to cure its aforesaid defaults, plaintiff served upon the defendant a notice of termination, dated December 24, 2020. Defendant thereafter failed to vacate, surrender, and to remove its property from the premises on or before January 8, 2021, and to date, remains in possession of the premises" (see NYSCEF Doc. No. 1 Par. 22 – 24).

Defendant attorney's affirmation affirms, "[f]or the period of October 2012 to March 2020 the tenant timely and faithfully paid the rent and additional rent as required by the lease and in fact had a credit of \$9,455.54 through March 2020. On or about March 22, 2021 pursuant to the Executive Order 202.8 the tenant closed their offices and did not use the premises. Further Governor Andrew Cuomo included in the Executive Order 202.8 a 90-day moratorium on eviction for commercial tenants. The moratorium/stay of initiating any action and/or of the

eviction of a commercial tenant for nonpayment has continued until at least February 22, 2021 pursuant to the latest E.O. 202.91” (see NYSCEF Doc. No. 6 Par. 5 – 6).

Defendant provides Executive Order 202.8, which provides in relevant part, “[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days” (see NYSCEF Doc. No. 10).

Plaintiff does not provide an affidavit from someone with firsthand knowledge of the circumstances surrounding this case. Defendant submits the affidavit of Gary Ostrow DO, President of Gary Ostrow DO PC, d/b/a Physician’s Health & Wellness. Defendant’s two page affidavit states, “[t]he defendant business has experienced financial hardship and is unable to pay the rent under the lease in full or obtain suitable commercial property for the reasons set forth in the hardship declaration” (see NYSCEF Doc. No. 22 Par. 4). Defendant provides the hardship declaration as an exhibit (see NYSCEF Doc. No. 21).

There remain questions of fact on when the default occurred and how much capital remains due and owing on the lease agreement. Defendant’s motion to dismiss is devoid of analysis of the facts under CPLR 3211(a)(2), the court has not jurisdiction of the subject matter when all the parties are New York residents, and CPLR 3211(a)(5), the cause of action may not be maintained because of arbitration and award ... or statute of frauds.

ORDERED that defendant’s motion to dismiss plaintiff’s first cause of action, for breach of lease for fixed rent and additional rent, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is DENIED; and it is further

ORDERED that defendant’s motion to dismiss plaintiff’s second cause of action, subsequent accruing fixed rent and additional rent, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is DENIED; and it is further

ORDERED that defendant’s motion to dismiss plaintiff’s third cause of action, declaratory judgment, CPLR 3001, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is DENIED; and it is further

ORDERED that defendant’s motion to dismiss plaintiff’s fourth cause of action, order of ejectment, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is DENIED; and it is further

ORDERED that defendant’s motion to dismiss plaintiff’s fifth cause of action, plaintiff’s costs and expenses including legal fees, pursuant to CPLR 3211(a)(1) and 3211(a)(7) is DENIED.

4/19/2021  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: