

39th Invs. LLC v Krivoruk
2021 NY Slip Op 32274(U)
November 9, 2021
Supreme Court, Kings County
Docket Number: Index No. 524360/2020
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 9th day of November, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

39TH INVESTORS LLC,
Plaintiff,
- against -

LEONID KRIVORUK and
FORTUNA VISUAL GROUP, INC.,
Defendants.

Index No.: 524360/2020

Motion Seq. # 1

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Plaintiff's Statement of Material Facts	2
Memorandum of Law in Support of Motion	3
Affirmation in Opposition to Motion	4
Reply Affidavit in Further Support of Motion	5
Memorandum of Law in Further Support	6

Upon the foregoing papers 39th Investors LLC ("Landlord"), moves this Court for an Order (a) pursuant to CPLR § 3212, granting Landlord summary judgment against Leonid Krivoruk ("Tenant") on the second and third causes of action for base and additional rent plus use and occupancy totaling \$33,088.81, plus statutory interest, costs, fees, and disbursements; (b) pursuant to CPLR § 3211(a), dismissing Tenant's defenses and counterclaims; (c) pursuant to CPLR § 3212, granting Landlord a subsequent and separate judgment against Tenant on the fifth cause of action for attorneys' fees and expenses pursuant to the lease, and a hearing to determine the amount; (d) granting statutory interest, costs and fees; and (e) granting Landlord such other, further and different relief as to the Court seems just, proper and equitable.

Background

This is a commercial landlord tenant case. On May 1, 2019, Landlord and Tenant entered into a lease for 1336 39th Street, Brooklyn, New York (“the Premises”), which expired on April 30, 2020. It is undisputed that Tenant began accruing rent arrears in January 2020 and stopped paying rent altogether in March 2020. Landlord maintains that Tenant remained in possession of the Premises until December 24, 2020. Tenant contends that he vacated the Premises in September of 2020. Tenant further argues that the COVID-19 pandemic and related shutdown orders abrogate Tenant’s ability and obligation to pay rent and/or use and occupancy.

The lease includes the following provision:

This lease and the obligation of Tenant to pay rent here under and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise [sic] be affected, impaired or excused because Landlord is unable to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make, or is delayed in making any repairs, additions, alterations or decorations or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of governmental preemption in connection with a national emergency declared by The President of the United States or in connection with any rule, order or regulation of any department or subdivision thereof or any government agency or by reason of the conditions of supply and demand which have been or are affected by war or other emergency.

Landlord claims that Tenant began accruing arrears before the pandemic or related shutdown orders affected Tenant or its business. Landlord further argues that the above lease provision defeats Tenant’s arguments and defenses that he was not obligated to pay rent and/or use and occupancy. In this action, Landlord sues for unpaid rent and/or use and occupancy.

Discussion

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. ***CPLR 3212 (b); Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).*** On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. ***Spinelli v. Procassini, 258 A.D.2d 577 (2d Dep't 1999); Tassone v. Johannemann, 232 A.D.2d 627, 628 (2d Dep't 1996); Weiss v. Garfield, 21 A.D.2d 156, 158 (3d Dep't 1964).*** The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. ***Alvarez v. Prospect Hosp, 68 N.Y.2d 320 (1986); Zuckerman v. City of New York, supra at 562; Friends of Animals, Inc v. Associated Fur Mfrs, Inc, 46 N.Y.2d 1065 (1979).***

“The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.” **RPL §220.** The award of use and occupancy may be based upon the “fair market rental value.” ***Split Rock Devs., LLC v. Zartab, Inc. 135 A.D.3d 845 (2d Dep't 2016).***

In the instant case, Tenant has provided no authority to support his contention that the COVID-19 pandemic abrogates Tenant’s obligation to pay rent and/or use and occupancy. The only issue of fact Tenant raises is when he vacated the Premises. Accordingly, summary judgment is granted to Landlord on the issue of rental arrears in the amount of \$16,370.15. Summary judgment on the issue of use and occupancy from May 2020 to September 2021 is

granted in the amount of \$16,250.00 (5 months at the rate of \$3,250 base rent). The issue of when Tenant vacated the Premises and the use and occupancy up to that date are referred to a JHO to hear and determine. Additionally, the issue of attorneys' fees is referred to a JHO to hear and determine.

The Court has reviewed Tenant's affirmative defense and counterclaims and dismisses them as without merit. It is HEREBY

ORDERED that summary judgment is granted to Landlord on the issue of rental arrears in the amount of \$16,370.15; and it is further

ORDERED that summary judgment is granted to Landlord on the issue of use and occupancy from May 2020 to September 2021 is granted in the amount of \$16,250.00 (5 months at the rate of \$3,250 base rent); and it is further

ORDERED that the matter is referred to a JHO to hear and determine the date of Tenant's vacatur from the Premises and attorneys' fees; and it is further

ORDERED Tenant's affirmative defenses and counterclaims are dismissed.

This is the Decision and Order of the Court.

ENTER



HON. LOREN BAILY-SCHIFFMAN