

**9 E. 62nd St. LLC v Shanna MD PLLC**

2021 NY Slip Op 32611(U)

December 6, 2021

Supreme Court, New York County

Docket Number: Index No. 153844/2021

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

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9 EAST 62ND STREET LLC

Plaintiff,

- v -

SHANNA MD PLLC,

Defendant.

INDEX NO. 153844/2021

MOTION DATE 08/31/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for

JUDGMENT - SUMMARY

In this commercial landlord-tenant breach of lease action, Plaintiff moves for an Order (a) pursuant to CPLR §3025(c), amending the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is to be heard; (b) pursuant to CPLR §3212, granting Plaintiff summary judgment against Defendant, awarding plaintiff a money judgment of \$76,427.00, plus statutory interest, costs, fees and disbursements and setting the matter down for a hearing to determine reasonable attorneys' fees and costs pursuant to the lease agreement; (c) pursuant to CPLR §3211(a) and §3212 dismissing Defendant's affirmative defenses; and (d) granting Plaintiff such other, further and different relief as is just and proper. Despite two stipulations for adjournment to allow Defendant to file opposition papers, no opposition to this motion has been received.

Leave to Amend

Plaintiff moves to amend the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is to be heard. Leave to amend a pleading

should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party (*see* CPLR §3025(b); *see also* *Solomon Holding Corp. v Golia*, 55 AD3d 507, 507 [1st Dept 2008]. Accordingly, Plaintiff's motion to amend the pleadings to include amounts due through the date of this decision is granted.

### Summary Judgment

The first cause of action is for a breach of contract due to Defendant's failure to pay the rent due under the Lease. The second cause of action seeks an order compelling the Defendant to replenish the rent security, the Plaintiff having applied all of the rent security toward rent arrears. The third cause of action seeks attorney's fees pursuant to ¶19 of the standard portion of the Lease and pursuant to ¶26 of the Rider to the Lease.

Defendant asserts seventeen affirmative defenses: failure to state cause of action, laches, Statute of Frauds, lack of privity of contract, Statute of Limitations, failure to mitigate, failure to join indispensable parties, doctrine of unclean hands, no meeting of the minds, lack of proper consideration, failure to perform under the contract, Impossibility of Performance, contract void ab initio as against public policy, lack of personal jurisdiction, failure to meet the pre-requisite notice requirements and failure to provide opportunity for Defendant to submit an economic hardship affidavit, force majeure, and Government 'taking.' (NYSCEF Doc. No. 5). Defendant has not provided any factual allegations in support of these alleged defenses.

The lease agreement is dated April 18, 2019, and was entered into between Plaintiff, as landlord, and Defendant Shanna MD PLLC, as tenant (herein the "Lease"). (NYSCEF Doc. No. 13). The space occupied by the Defendant consists of a medical office located on the ground floor, front office, Unit 1-F, at the Building (herein the "Premises"). The Premises is used as a

medical office managed and conducted by Defendant's principal, Dr. Shanna Levine, who executed the Lease on behalf of the Defendant.

Plaintiff contends that as Defendant's rent arrears accrued, the \$51,360.00 in rent security was applied in its entirety to offset part of the rent arrears that Defendant owed. The Lease at ¶34 requires the replenishment of the security deposit and ¶15(c) of the Rider to the Lease requires that the rent security be increased for every annual rent increase, so that the rent security will always be 6 months of the then current rent. (*Id.*) Plaintiff contends that as of June 1, 2021, the monthly rent was \$9,528.00 per month, and therefore \$57,168.00 is the amount of rent security that Defendant should now have on deposit with the Plaintiff.

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1<sup>st</sup> Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiffs' burden, on a motion for summary judgment on affirmative defenses is identical to a similar motion on the main claims. Plaintiffs must prove that they are entitled to judgment as

a matter of law, and the absence of any triable issues of fact (*Tiff v Benson*, 109 AD2d 1006 [3d Dept 1985]; *Vertical Computer Systems, Inc. v Ross Systems, Inc.*, No. 600644/03, 2006 WL 6157480 [2006]). It is well settled that in order to defeat a motion for summary judgment, a party must come forward with evidentiary proof in admissible form sufficient to raise triable issues of fact (*Kruse v Capuozzo*, No. 100674/09, 2010 WL 1437733 [2010]).

Plaintiff has met its *prima facie* burden on summary judgment.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$ \$76,427.00, with interest of \$4,297.80, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further


ORDERED that plaintiff's motion for summary judgment on defendant's affirmative defenses is granted; and it is further

ORDERED that the issue of the attorney fees is severed and referred to the Special Referee Clerk for assignment to a Special Referee to hear and report pursuant to the accompanying Order of Reference and, pending receipt of the report and a motion pursuant to CPLR §4403, final determination of that branch of the motion is held in abeyance; and it is further

ORDERED that counsel for the movant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry and the accompanying Order of Reference, together

with a complete Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the General Clerk's Office (60 Centre Street, Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date subsequent to the conclusion of the stay fixed above; and it is further

ORDERED that such service upon the Special Referee Clerk, the filing of a notice of appearance as provided above with the Clerk of the General Clerk's Office, and service of documents on the Special Referee shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

<u>12/6/2021</u> DATE	 SHAWN KELLY, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	<input type="checkbox"/> REFERENCE

<sup>1</sup> Available on the Court's website at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) (under the "References" link in the navigator bar).