

**601-609 W. 175th St. Corp. v Discount Linen &
Beyond Inc.**

2022 NY Slip Op 33189(U)

September 21, 2022

Supreme Court, New York County

Docket Number: Index No. 154396/2021

Judge: Mary V. Rosado

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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 33

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601-609 WEST 175TH STREET CORP.,

Plaintiff,

- v -

DISCOUNT LINEN & BEYOND INC., XYZ CORP.

Defendant.

INDEX NO. 154396/2021

MOTION DATE 10/04/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, Plaintiff 601-609 West 175th Street Corp.'s ("Landlord") motion for summary judgment seeking declaratory judgment and use and occupancy is denied.

I. Factual and Procedural Background

Landlord is the owner of the premises of 609 West 175th Street, New York, New York ("the building") (NYSCEF Doc. 1 at ¶ 5). Landlord entered a written lease (the "Lease") with Defendant Discount Linen & Beyond ("Tenant"). The Lease ran from September 1, 2009, through August 31, 2019. Tenant leased store #2 on the ground floor commercial space in the building (*id.* at ¶ 6).

Article 68 of the Lease (the "Renewal Clause") allowed Tenant to renew the lease for an additional five-year term at a rental rate equal to the fair market value and upon the same terms and conditions of the Lease (NYSCEF Doc. 14). Around mid-2019, Jose Terrero, a real estate agent licensed in New York since 2012, was retained by Landlord's managing agent to determine

the fair market value of Tenant's rent (NYSCEF Doc. 17). Terrero, who claims to specialize in the

rental of commercial spaces in Washington Heights, determined that as of September 1, 2019 the fair market value for Tenant's premises was eighty dollars (\$80.00) per square foot (*id.*).

Maria Mammano, who is employed by Plaintiff's managing agent, used Terrero's appraisal to provide Tenant with a renewal offer of \$17,393.33 of monthly rent (NYSCEF Doc. 18 at ¶ 8). According to Mammano, Tenant's principal, Rafit Ijbara, requested the rent offered on renewal to be reduced several times (*id.* at ¶¶ 10-11). Mammano claims she advised Mr. Ijbara that the fair market value was established by third-party professionals (*id.*). The Lease expired on August 31 (*id.* at ¶ 13). Tenant remains in the premises (NYSCEF Doc. 1 at ¶ 12).

Landlord commenced a holdover proceeding against Tenant in Housing Court (L& T 52117/2020) ("Housing Court Action"). In that action, Tenant asserted that it had exercised its renewal option and therefore a lease exists so the holdover proceeding should be dismissed (NYSCEF Doc. 16). Tenant argued that what was at issue was whether the rent for the renewed lease was at fair market value per the terms of Article 68 of the original Lease (*id.*). The Court in the Housing Court Action found that the Lease had not expired, and that Tenant properly exercised its option to renew (*id.*) However, the Court could not issue a declaratory judgment determining the appropriate fair market value at which to set rent because Housing Court cannot provide equitable relief (*id.*). The Court dismissed the holdover action based on the existence of the renewed Lease and suggested Landlord seek declaratory judgment regarding the fair market rent in Supreme Court (*id.*)

Landlord then commenced this action seeking declaratory judgment, ejectment, and use and occupancy (NYSCEF Doc. 1). Tenant answered and asserted various counterclaims. (NYSCEF Doc. 5). Landlord replied to Tenant's counterclaims and filed this motion for summary judgment seeking declaratory relief and use and occupancy (NYSCEF Docs. 7, 9).

Tenant opposed Landlord's motion for summary judgment by arguing Landlord has not met its evidentiary burden (NYSCEF Doc. 22). Tenant argues that Terrero has not stated how he concluded that \$80 per square foot was reasonable, nor has he shown any comparable in support of his assessment (*id.*) Moreover, Tenant argues that the documentary evidence supporting the motion for summary judgment is inadmissible as it was only authenticated by Landlord's counsel.

II. Discussion

A. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. See *e.g.*, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

B. Declaratory Judgment

At this time, viewing the facts in the light most favorable to the non-moving party, the lack of discovery, and the evidence presented, the Court cannot grant Landlord the declaratory relief it seeks. It is undisputed that the monthly rent for the premises in 2019 was \$9,785.00, yet Landlord asks this Court to issue declaratory relief stating that \$17,393.33 is the fair market value for

monthly rent. Landlord provides no explanation for the large disparity between the rent charged in 2019 and the proposed monthly rent for the renewal lease commencing in 2020 (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011] [In determining fair market value, the rent reserved under the lease, while not conclusive, is probative]). On the other hand, Tenant has disputed the validity of the disparity between the 2019 rent and renewal rent by testifying via sworn affidavit that the large increase was retaliatory in nature (NYSCEF Doc.22).

Moreover, while Landlord presents the affidavit of a realtor who appraised the property for its fair market value, there is no explanation as to how the realtor appraised the fair market value of the premises at \$80 per square foot. Rather, the affidavit states in conclusory fashion that the realtor has specialized in commercial store fronts in Washington Heights since 2015 and therefore concluded that the fair market value of the premises is \$80 per square foot. The moving party's burden on summary judgment is a heavy one. It requires the movant to tender sufficient evidence to demonstrate no triable issues of fact. The Court finds the conclusory evidence proffered in support of Landlord's motion insufficient to grant summary judgment (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384-385 [2005] [holding that a conclusory affidavit does not establish movant's prima facie burden]).

C. Use and Occupancy

Landlord's motion for summary judgment seeking use and occupancy is also denied. It is well established that to make a prima facie showing, a party must submit sufficient evidence in admissible form to prove each and every essential element of the cause of action as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The documents upon which Landlord bases its motion for use and occupancy are authenticated only by counsel rather than by someone with personal knowledge of the records (*JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472,

472-473 [1st Dept 2014] [holding that attorney’s affirmation is insufficient to establish a document as an admissible business record]). Tenant correctly challenges the admissibility of the documents in support of Landlord’s motion which are only authenticated by counsel. Although Maria Mammano, an employee of Landlord’s management company, provided an affidavit where ostensibly she could have authenticated these business records, she did not authenticate the records. Further, there is no authenticated ledger showing amounts due and owing. Landlord has also failed to provide a separate Statement of Material Facts pursuant to 22 NYCRR § 202.8-g(a) (*Amos Fin. LLC v Crapanzano*, 73 Misc 3d 448 [Sup Ct, Rockland County 2021] [holding total failure to submit a Uniform rule 202.8-g Statement of Material Facts constitutes a violation that is neither merely technical nor without prejudice]; *accord Medallion Bank v Chopper Taxi Inc.*, 2021 N.Y. Slip. Op 32645(U) [Sup Ct, New York County 2021]). Therefore, the motion is denied without prejudice with leave to renew upon proper supporting papers.

Accordingly it is hereby,

ORDERED that Landlord’s motion for summary judgment is denied without prejudice and it is further,

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Order upon defendant, with notice of entry.

This constitutes the decision and order of the Court.

9/21/2022

DATE

Mary V Rosado
 HON. MARY V. ROSADO, 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