

Gavriellov v Unger Consulting Group Ltd.

2023 NY Slip Op 30341(U)

February 2, 2023

Supreme Court, New York County

Docket Number: Index No. 157950/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

MEIRAV GAVRIELOV, VARAN GAVRIELOV

Plaintiff,

- v -

UNGER CONSULTING GROUP LTD, HAROLD M UNGER,

Defendant.

-----X

INDEX NO. 157950/2021

MOTION DATE 10/26/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff commenced this action seeking damages based on defendants' use and occupancy of apartment 5-B, at 220 East 65th Street, New York, New York 10065, as a hold over tenant. Plaintiff moves for summary judgment and to dismiss defendants' affirmative defenses and counterclaims. Defendant opposes the instant motion and cross moves to dismiss the complaint.

Background

Defendant Unger Consulting Group Ltd. (UCG) was the tenant of record of the premises pursuant to a written rental agreement for a term beginning on March 1, 2014, and expiring on February 29, 2016. Defendant, Harold M. Unger, as the sole shareholder and officer of the company resided at the premises. Upon the expiration of the lease, defendants refused to enter into another lease agreement with plaintiffs however it is undisputed that defendants remained on the premises until September 30, 2020.

In 2016, plaintiffs initiated a holdover proceeding in New York County Civil Court, which ultimately resulted in a favorable determination for the plaintiffs by the Appellate Division First Department. In accordance with the First Department decision, the New York County Civil Court granted plaintiffs' motion for summary judgment and dismissed defendants' affirmative defenses by order dated June 27, 2020. In 2017, while the holdover proceeding was pending, plaintiffs initiated a nonpayment proceeding in the New York County Civil Court which was ultimately resolved via stipulation between the parties. *See* NYSCEF Doc. 17.

Pursuant to the terms of the stipulation the defendants agreed to pay monthly rent; however, plaintiffs reserved their rights to seek additional rent subject to the fair market value of the unit. The stipulation further provides that neither party waived any rights, defenses or counterclaims.

Summary Judgment Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

Preliminarily, plaintiffs sought dismissal of defendants' first, second, sixth and seventh affirmative defenses as legally deficient pursuant to CPLR § 3211(b), defendants do not oppose the portion of plaintiffs' motion, accordingly that portion of plaintiffs' motion is granted without opposition. The Court agrees with plaintiff and finds that defendants' fifth, eighth, ninth, eleventh, twelfth, and thirteenth affirmative defenses and first, second, fifth, sixth, and seventh counterclaim were raised in the holdover proceeding, and were ultimately dismissed pursuant to the 2019 Appellate Division Order and the June 27, 2020, Order of Judge Katz granting the petitioners' cross motion for summary judgment on the petition and to dismiss respondents' affirmative defenses and counterclaims.

In opposition, defendants' contend that the 2017 stipulation signed by the parties specifically allowed defendants' to preserve their counterclaims and defenses, despite a court order dismissing those same claims. The Court finds that an illogical conclusion, as the stipulation was entered while awaiting the First Department's determination on the same issues that the stipulation addresses. The Court finds that defendants have failed to establish how the previous dismissal of those defenses and counterclaims are not barred by the doctrine of *res judicata*. As such, only defendants' third and tenth affirmative defenses and third and fourth counterclaims survive and do not preclude plaintiffs from being awarded summary judgment as to liability.

The main contention of defendants in opposition is the amount and calculation of damages that plaintiff seeks, not that defendants were holdover tenants. Both parties agree that a hearing is appropriate and necessary to determine damages. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to liability; and it is further

ORDERED that a trial of the issues regarding damages shall be had before this Court; and it is further

ORDERED that plaintiff shall, upon completion of discovery with respect to defendants' counterclaims, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office 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).

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LYLE E. FRANK, J.S.C.

2/2/2023
DATE

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