

**Big Spaceship LLC v 55 Wash. St. LLC**

2023 NY Slip Op 31794(U)

May 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 509668/22

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 35

\_\_\_\_\_  
BIG SPACESHIP LLC,

Plaintiff,

-against-

55 WASHINGTON STREET LLC,

Defendants.

X

X

Index No. 509668/22  
AMENDED  
DECISION & ORDER

Recitation, as required by CPLR §2219 [a], of the papers considered in this motion and cross-motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavit.....	23-44
Answering Affidavits.....	62-68
Replying Affidavits.....	69
Notice of Cross-Motion and Affidavit.....	46-59

Upon the foregoing cited papers and following oral argument, the Decision/Order on this motion is as follows:

In this action to recover damages for breach of lease for failing to return a security deposit, the plaintiff moves [seq. no. 1] for an order pursuant to CPLR 3212, granting summary judgment in its favor in the amount of \$346,932.00, representing the full amount of its security deposit, together with statutory interest of 9% from October 21, 2021. Defendant opposes the plaintiff's motion and cross-moves [seq. no. 2] for an order pursuant to CPLR 3212, granting it partial summary judgment on plaintiff's cause of action to the extent that the sum of \$47,384.80 for unpaid base rent for the period of August 1, 2021, through August 15, 2021, be deducted and withheld from plaintiff's security deposit.

In August 2016, the plaintiff entered into a 10-year commercial lease with the defendant for the premises located 55 Washington Street, Suite 500, Brooklyn, and paid the defendant a security deposit in the sum of \$346,932.00. Article 3 of the parties' lease provided that the security deposit would be returned to plaintiff - as long as there was no breach of the lease - on the latter to occur of: (a) the date fixed as the end of the term hereof; (b) after Tenant delivers possession of the demised premises to Landlord in the condition required under this Lease; or (c) sixty (60) days following the Expiration Date

of the Term." After the expiration date of the lease term on August 15, 2021<sup>1</sup>, plaintiff requested the return of its security deposit. Defendant ultimately refused to return the full amount of the deposit claiming it was due certain unamortized credits and payments as a result of plaintiff's surrender of the leased premises on August 11, 2021, which was "prior to the Expiration Date of the Term," August 15, 2021.

Plaintiff establishes its prima facie entitlement to judgment as a matter of law on its cause of action alleging breach of the lease for failing to return the security deposit. The submissions demonstrate that the plaintiff surrendered possession of the leased premises by the expiration date of the lease term, August 15, 2021, and that defendant failed to return the full security deposit 60 days thereafter (*see generally Pezzo v 26 Seventh Ave. South, LLC*, 144 AD3d 778 [2d Dept 2016]). In opposition, the defendant fails to raise a triable issue of fact as to an early surrender in breach of the lease. Even assuming that plaintiff surrendered possession of the premises on August 11, 2021, four (4) days before the expiration of the lease term of August 15, 2021, it does not constitute an early termination entitling defendant to a credit for the unamortized broker fee under Article 2 of the lease or repayment of the pro-rated rent credit under Article 48 of the lease. An early termination would have only occurred if plaintiff surrendered possession with additional months/years (future rent) remaining on the lease term.

Accordingly, plaintiff is granted summary judgment on its claim for the return of its security deposit.

Defendant, however, demonstrates its prima facie entitlement to partial summary judgment on its cross-motion in that it is entitled to deduct from the security deposit, rent arrears in the amount of \$47,384.80 for the period August 1, 2021 through August 15, 2021, the lease end date. In an affidavit submitted in support of the cross-motion, Elizabeth Bueno, the Director of Commercial Leasing for Two Trees Management Co. LLC, the managing agent for defendant, states that defendant did not receive plaintiff's payment of the base rent for the period of August 1, 2021 through August 15, 2021. Ms. Bueno references Article 3 of the lease, which provides, in relevant part, that the "Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any amount payable hereunder as to which Tenant is in default under this Lease..." and states that once it became apparent that no payments for August 2021 rent would be received, defendant exercised its right to withhold and draw the rent amount from the plaintiff's security deposit.

Contrary to plaintiff's contentions, defendant was not obligated to apply a rent credit of \$106,837.00 against the rent plaintiff owed on August 15, 2021. Article 2 of the lease states the following, in pertinent part, with respect to base rent:

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<sup>1</sup> August 15, 2021 became the end date of the lease term after plaintiff exercised its early termination rights under Article 56 of the lease. The August 15, 2021 termination date was later confirmed by order of the Hon. Lilian Wan dated December 3, 2021.

“[a]nnual base rent shall be paid in monthly installments in advance on the first day of each month during the Term hereof...”

In addition, Article 2 of the lease states the following with respect to rent credits:

“[p]rovided Tenant is not then in default of his obligations under this Lease, Tenant shall be entitled to a rent credit (“Rent Credit”) in the aggregate Amount of \$598,815.00 to be applied by Landlord as follows: \$271,815.00 to be applied against monthly installments owed between the Commencement Date and three months thereafter; \$106,837.00 to be applied against rent owed on the fifth anniversary of the Commencement Date; and \$111,153.00 to be applied against rent owed on the seventh anniversary of the Commencement Date.”

“When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations” (*Hall v Paez*, 77 AD3d 620, 621 [2d Dept 2010] quoting *Franklin Apt. Assocs., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]). Consequently, where a written agreement is complete, clear, and unambiguous on its face, it must be enforced according to the plain meaning of its terms (*see Hall, supra*). Here, the lease defines the Commencement Date as August 15, 2016. As plaintiff surrendered possession of the leased premises on August 15, 2021, it was no longer a tenant on the 5th anniversary of the Commencement Date, and, therefore, was not entitled to the rent credit set forth under Article 2 of the lease. Moreover, as the lease required the monthly rent installments to be paid in advance on the first day of the month, it is clear that the rent credit was to be applied prospectively to future rent and not, as plaintiff contends, retroactively to past due rent.

Furthermore, extrinsic or parol evidence “is not admissible to create an ambiguity in a written agreement which is clear and unambiguous upon its face” (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022]). Therefore, plaintiff may not rely on the invoice to modify the clear terms of the lease as to its responsibility to pay the pro-rated portion of the monthly rent for August 2021.

Accordingly, defendant is granted partial summary judgment on its cross-motion against plaintiff to the extent that the sum of \$47,384.80 for unpaid base rent for the period of August 1, 2021, through August 15, 2021, shall be deducted and withheld from plaintiff’s security deposit.

In view of the foregoing, the plaintiff is awarded a judgment against the defendant in the principal sum of \$299,547.20, representing the security deposit amount of

\$346,932.00 less the rent arrears of \$47,384.80. Interest on the judgment shall run from October 14, 2021.

This constitutes the Order and Decision of the court.

Dated: May 25, 2023

ENTER,



Hon. Karen B. Rothenberg, J. S. C.