

**Jonathan Schestowitz Ltd. v Jones**

2023 NY Slip Op 32159(U)

June 15, 2023

Supreme Court, New York County

Docket Number: Index No. 160176/2020

Judge: Verna L. Saunders

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privity of contract with plaintiff (third affirmative defense); that under-tenant was not and has never resided at the premises (fourth affirmative defense); that the purported notice of non-renewal was defective as a matter of law, and was a nullity (fifth affirmative defense); that plaintiff is not entitled to an ejectment (sixth affirmative defense); that tenant is entitled to an abatement in rent because she was constructively evicted from the damaged portions of the premises as a result of pervasive mold in the premises (seventh affirmative defense); and that tenant is entitled to an abatement in rent as the result of being actually evicted from her apartment when she was prevented from entering the building or the premises from on or about August 2020 through April 2021 after testing positive for COVID-19 (eighth affirmative defense) (NYSCEF Doc. No. 45, *answer & defenses*).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting it summary judgment against tenant for rent due pursuant to the subject lease covering the period of April 1, 2019, through March 31, 2020; reasonable use and occupancy of the subject premises covering the period of April 1, 2020, through the present as against defendants, in the amount of at least \$462,500.00; a money judgment against defendants based on unjust enrichment, as well as, a judgment of ejectment, awarding plaintiff possession of the apartment. Plaintiff also seeks to strike all of defendants' affirmative defenses pursuant to CPLR 3211(b); attorneys' fees in an amount to be determined after a hearing; and an order, pursuant to CPLR 3025(c), granting plaintiff leave to conform its verified complaint to the evidence presented in this motion to claim all unpaid rent and use and occupancy. (NYSCEF Doc. Nos. 49, *memo of law*, pg 6, 14; 61, *Honig Aff*, ¶ 4). (Mot. Seq. 002).

Plaintiff also moves the court, by order to show cause, for an order directing defendants to pay ongoing monthly use and occupancy to plaintiff relating to the premises, *pendente lite*, in the amount of \$18,500.00 per month as set forth in the written lease agreement between the parties. (Mot. Seq. 003).<sup>1</sup>

Both motions are hereby consolidated for disposition.

Addressing first the application for summary judgment, defendants oppose the motion and cross-move, pursuant to CPLR 3212, to dismiss this action as against the under-tenant, on the ground that he lacks privity of contract with plaintiff. (NYSCEF Doc. No. 50, *notice of cross-motion*, pg. 1; NYSCEF Doc. No. 51, *joint affirmation in support of cross-motion & in opposition to summary judgment*, ¶1-6). Under-tenant Kay proffers an affidavit wherein he affirms that he has never lived in the subject apartment but, rather, has been living in the United Kingdom since 2018. (NYSCEF Doc. No. 52, *Kay affidavit in opposition and in support of cross-motion*, ¶ 12-13). Tenant argues that plaintiff's motion for summary judgment should be denied because no discovery has been conducted in this case. She claims that issues of fact with respect to her entitlement to an abatement due to constructive/actual eviction exist because mold which started in or about 2019 is still present at the premises, and she was denied access to the premises from on or about August 2020 through April 2021 when she tested positive for COVID-19. (NYSCEF Doc. No. 53, *Jones affidavit*, ¶5-9, 20-26).

Furthermore, tenant argues in opposition to Mot. Seq. 003 that, should the court be inclined to direct her to pay use and occupancy, it should be at a rate less than \$18,500.00 per month and in an amount of no more than \$15,000.00 per month, asserting that several apartments in plaintiff's

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<sup>1</sup> Plaintiff filed a notice of rejection, rejecting tenant's opposition to Mot. Seq. 003 as untimely. (NYSCEF Doc. No. 77, *notice of rejection*). However, this court will disregard the one-day delay in filing the papers given the lack of prejudice to plaintiff (see CPLR 2001).

building are rented for less than \$18,500.00. (NYSCEF Doc. No. 75, *Jones affidavit in opposition*). Tenant also argues that plaintiff is not entitled to receive use and occupancy from the under-tenant, Kay, because he is neither a party to the lease nor a tenant under the lease.

In reply, plaintiff argues that defendants fail to oppose that portion of its summary judgment motion seeking ejectment. Moreover, according to plaintiff, tenant's contention that she is entitled to an abatement of the amounts owed to plaintiff since she was not able to use certain portions of the subject apartment should be rejected. It argues that the proof proffered in support of the alleged mold condition in the premises has not been authenticated and, thus, fails to raise an issue of fact to defeat summary judgment in favor of plaintiff. (NYSCEF Doc. No. 58, *memo of law in reply*, pg. 3-4). Plaintiff further argues that tenant's affidavit is inadmissible and must be disregarded in its entirety as it does not include a certificate of conformity pursuant to CPLR 2309(c), which provides that an affidavit notarized by an out-of-state notary must include a certificate of conformity to be valid. (*id.*, at pg. 5). Lastly, plaintiff argues that the under-tenant has not successfully opposed that part of the motion seeking financial remuneration based on unjust enrichment and that defendants have failed to address plaintiff's motion seeking to strike the affirmative defenses. (*id.*, at pg. 7).

It is well-settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been 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 of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (see *Zuckerman*, 49 NY2d at 562).

In order to establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff's performance under the contract, defendant's breach thereof, and damages as a result. (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019].) Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted. (see *Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001]).

Section 220 of the Real Property Law provides that in an action for use and occupancy "[t]he 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." A "court has broad discretion in awarding use and occupancy *pendente lite*" (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000].)

When considering a defendant's motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

With respect to the summary judgment motion, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment on its breach of lease claim as against tenant. Here, it is undisputed that there was a valid lease between plaintiff and tenant, plaintiff performed by permitting tenant to reside at premises pursuant to the lease, tenant failed to make the required payments and plaintiff now seeks damages for rent arrears. (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Tenant, in her affidavit, does not dispute plaintiff's allegation that she owes rent under the lease covering the period of April 1, 2019, through March 31, 2020. (NYSCEF Doc. No. 53, *Jones affidavit in opposition to motion*). And, insofar as tenant has failed to submit any admissible proof establishing that material issues of fact exist with respect to her defenses premised on actual/constructive eviction, that portion of plaintiff's motion seeking rent and additional rent in the amount of \$223,729.84, representing monies due from April 1, 2019, through March 31, 2020, is granted.

Next, the court grants that portion of plaintiff's motion seeking to amend the complaint to conform the pleadings to the proof. Pursuant to CPLR 3025(c), the court "may permit pleadings to be amended before or after judgment to conform them to the evidence." It has also been held that "[a]pplications to amend pleadings are within the sound discretion of the court" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014].) "The operative factor considered upon a motion to conform pleadings is prejudice to the nonmoving party" (*Gonfiantini v Zino*, 184 AD2d 368 [1st Dept 1992].) Here, plaintiff seeks to conform the complaint to include all use and occupancy to date and defendants have failed to establish any prejudice. No opposition is raised with respect to this branch of the motion. Therefore, the motion seeking to conform the pleadings to the proof to reflect the outstanding amount in use and occupancy to date, is granted.

Turning to that branch of the motion seeking use and occupancy, "[t]he reasonable value of use and occupancy is the fair market value of the premises after the expiration of the lease" (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 471 [1st Dept 2011].) Here, the court also grants that branch of plaintiff's motion seeking use and occupancy in the amount of \$462,500.00 for the period of April 1, 2020, through April 1, 2022, as against tenant only. Plaintiff complied with Real Property Law § 226-c(1)(a), which holds, in pertinent part, that whenever "... the landlord does not intend to renew the tenancy, the landlord shall provide written notice as required..." Plaintiff timely served tenant with a Notice of Non-Renewal of Lease and Notice of Termination of Tenancy dated November 20, 2020 (NYSCEF Doc. No. 47, *Exhibit D-termination notice*), whereby tenant was required to quit, vacate and surrender possession of the premises to the landlord, on or before the termination date. Plaintiff establishes that the tenant continues to occupy the premises past the termination date without plaintiff's consent. In opposition to this relief, tenant contends that she was actually/constructively evicted from the premises and is, thus, subject to an abatement; however, the court notes that tenant relies solely on her affidavit for this claim, which was notarized without the state and not accompanied by the requisite certificate of conformity as required under CPLR 2309(c), despite plaintiff's timely objection in its reply brief. Therefore, it is not properly before the court (see *Green v Fairway Operating Corp.*, 72 AD3d 613, 613 [1st Dept, 2013]), and it is insufficient to raise an issue of fact to defeat summary judgment for use and occupancy.

Now, addressing the motion seeking a judgment, *pendente lite*, (Mot. Seq. 003) against defendants seeking use and occupancy of the premises for the period of April 1, 2020, through the present "[u]nder New York law, a landlord's entitlement to receive, and an occupant's obligation to pay, a reasonable fee for use and occupancy of a premises is not contingent on an underlying

contract; rather, ... is predicated upon the theory of quantum meruit..." (*Fifth Ave. Partners, L.P. v Doniger*, 2013 NY Slip Op 30797[U] \*\*5 [Sup Ct, NY 2013].) This reasoning is based on the principle that it "manifestly unfair that [a] defendant should be permitted to remain in possession of the subject premises without paying for their use" (*MMB Assoc. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991]) and that it is against equity and good conscience to permit tenant to continue to occupy the said premises without paying rent. (see *Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 7 [2014]). It is well-settled that the landlords are entitled to an appropriate payment pending the outcome of the underlying litigation. (see *Trump CPS L.L.P. v Meyer*, 249 AD2d 22, 23 [1st Dept 1998]). Here, insofar as "[t]he court has broad discretion in awarding use and occupancy *pendente lite*, and may look to the amount of rent paid under a prior lease between the parties" when awarding said relief (*558 Seventh Ave. Corp. v PKNY IV LLC*, 2022 NY Slip Op 34032[U], \*\*3 [Sup Ct, NY County 2022]; see *43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501, 501, [1st Dept 2013]; *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]), this court grants the application to the extent it directs that tenant pay use and occupancy, *pendente lite*, at the monthly rental amount set forth in the lease, from March 1, 2022, until date of vacatur.

Addressing the affirmative defenses that relate to tenant, and based on the foregoing, this court finds that tenant has failed to raise an issue of fact sufficient to defeat granting that portion of plaintiff's motion seeking dismissal of tenant's affirmative defenses. Therefore, the court grants that portion of plaintiff's motion seeking dismissal of tenant's affirmative defenses

The court notes, however, that plaintiff has not established, *prima facie*, that the under-tenant resided or resides at the premises during the holdover period. Plaintiff merely alleges that, upon information and belief, the under-tenant resides in the premises, names the under-tenant in the Termination Notice and proffers an affidavit of service from the process server who claims to have served a male with British accent at the said premises with the Notice of Non-Renewal of Lease and Notice of Termination of Tenancy. (NYSCEF Doc. No. 47, *termination of notice*). Plaintiff does not provide any indicia of residency to evince that the under-tenant resided or resides at the premises. Therefore, use and occupancy is granted only as to tenant, but it is otherwise denied as to under-tenant Kay.

Addressing now the portion of the summary judgment motion seeking eviction, plaintiff has established its *prima facie* entitlement to ejectment as against tenant. "To demonstrate entitlement to judgment on a cause of action for ejection, a plaintiff must establish '(1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate'" (*City of NY v Anton*, 169 AD3d 999, 1001 [2d Dept 2019], quoting *RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC*, 144 AD3d 1125, 1126 [2d Dept 2016]; see also *Donnelly v Neumann*, 170 AD3d 597 [1st Dept 2019], citing *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009].) Here, it is undisputed that plaintiff is the owner of the premises; terminated defendants' tenancy and notified the same that the lease will not be renewed; and tenant still occupies the premises. This court finds tenant fails to raise a material issue of fact, in opposition, to warrant a trial on this claim. Therefore, plaintiff has established its entitlement to ejectment as against tenant Jones only.

With regard to that branch of plaintiff's summary judgment motion seeking to strike of affirmative defenses that relate to under-tenant, for reasons already articulated, the court finds that plaintiff failed to establish that the under-tenant resides or resided at the premises and therefore is not entitled to dismissal of those affirmative defenses, namely, that under-tenant is not in privity of



contract with plaintiff (third affirmative defense); that under-tenant was not and has never resided at the premises (fourth affirmative defense). In a motion to strike affirmative defenses, plaintiff has “the burden of showing on their motion that the defense ... is inadequate on its face” (*Bernstein v Freudman*, 180 AD2d 420, 421 [1st Dept 1992].) Insofar as plaintiff has not established that defendant Kay resides or resided at the premises, the claim seeking financial remuneration against the under-tenant based upon unjust enrichment does not lie. (see *JDS Highline LLC v 514 W. 24th St. Partners LLC*, 2021 NY Slip Op 31042[U] \*17 [Sup Ct, NY County 2021], citing *Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017] [“The unjust enrichment claim is also foreclosed by the existence of a valid and enforceable written contract governing the subject matter . . . even though defendant is a third-party non-signatory to the agreement]; see also *Mueller v Michael Janssen Gallery Pte. Ltd.*, 225 F. Supp 3d 201, 207 [SD NY 2016].) Given the circumstances and facts above, the action is dismissed as against defendant Kay.

Furthermore, the court grants that portion of plaintiff’s summary judgment motion seeking attorney fees. Attorney fees may be included in a judgment when the terms of the lease so provide. (see *Brusco v Braun*, 199 AD2d 27, 29 [1st Dept 1993]). Here, paragraph 20(a)(iv) of the undisputed lease expressly provides that the tenant will reimburse plaintiff for any legal fees incurred due to her default, such as failing to pay rent as envisioned under the lease. That branch of the motion shall be referred to a special referee to hear and determine the appropriate amount.

Defendants’ cross-motion for summary judgment seeking to dismiss this action as against the under-tenant is denied as moot given the findings above. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

**ORDERED** that the motion brought by plaintiff for summary judgment against defendant ELIZABETH JONES on the first cause of action in the amount of \$223,729.84, covering the period of April 2019 through March 2020, under Mot. Seq. 002 is granted; and it is further

**ORDERED** that that branch of plaintiff’s summary judgment motion seeking to conform the complaint to the proof under Mot. Seq. 002 is granted; and it is further

**ORDERED** that that branch of Mot. Seq. 002 seeking use and occupancy in the amount of \$462,500.00 for the period of April 2020 through April 2022, against defendants is granted only to the extent that judgment is entered as against ELIZABETH JONES; and it is further

**ORDERED** that plaintiff’s request for use and occupancy against defendants in Mot. Seq. 003 is granted only as against defendant ELIZABETH JONES in the amount of \$18,500.00 per month from May 2022, until the date of ejection; and it is further

**ORDERED** that that branch of plaintiff’s motion in Mot. Seq. 002 seeking summary judgment against defendants for ejection (fifth cause of action) from the premises is granted only as to defendant ELIZABETH JONES, but it is otherwise denied as to defendant WARREN KAY; and it is further

**ORDERED** that that branch of the motion in Mot. Seq. 002 seeking attorney fees is granted only as against defendant ELIZABETH JONES and is to be determined by a special referee; and it is further

**ORDERED** that that branch of the motion in Mot. Seq. 002 seeking dismissal of defendants' affirmative defenses is denied as to the third and fourth affirmative defenses, but it is otherwise granted; and it is further

**ORDERED** that the action is dismissed as against under-tenant, defendant WARREN KAY; and it is further

**ORDERED** that the cross-motion brought by defendants seeking dismissal of the action as against defendant WARREN KAY is denied as moot; and it is further

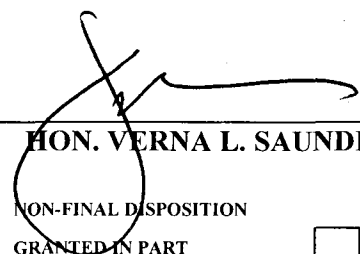
**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendants, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly and amend the caption in accordance with the foregoing; and it is further

**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee Clerk 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)).

This constitutes the decision and order of this court.

June 15, 2023

  
HON. VERNA L. SAUNDERS, JSC

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