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2021-02-10

### Epic Candler LLC v. Live Nation Worldwide, Inc.

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**Epic Candler LLC v Live Nation Worldwide, Inc.**

2021 NY Slip Op 30422(U)

February 10, 2021

Supreme Court, New York County

Docket Number: 656371/2020

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 14

*Justice*

-----X

EPIC CANDLER LLC

Plaintiff,

- v -

LIVE NATION WORLDWIDE, INC.,

Defendant.

-----X

INDEX NO. 656371/2020

MOTION DATE 02/09/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 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

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant's motion for summary judgment is granted in part.

**Background**

Plaintiff (landlord) brings this case relating to a commercial lease for an entire building in Manhattan. It claims it sent a removal notice on May 4, 2020 pursuant to the lease which required defendant (the tenant) to remove certain items in the retail space and restore the premises to its condition before the lease expired. Plaintiff alleges that defendant failed to send a removal notice to its subtenant (a McDonald's located on the first two floors) and that defendant did not remove items from the premises although it did surrender the premises to plaintiff.

Plaintiff contends that the restaurant area still had a freezer and refrigerators that were not removed. It also complains that the floors and ceilings were altered during the tenancy so that plaintiff will be forced to do work fixing the second floor in order to restore the space to the

condition it was prior to the lease. Plaintiff estimates that the cost of the removal and restoration work will cost nearly \$4 million and alleges that defendant owes rent as a holdover tenant.

Defendants moves for summary judgment dismissing the second (holdover) and third (legal fees) causes of action and on its first counterclaim for declaratory relief that it properly surrendered the property. It claims that plaintiff is trying to hold it liable under a lease for an entire 24-story building based on a small portion of the property (the restaurant on the first few floors). Defendant insists that there is no basis to find that it is a holdover tenant based on its alleged failure to return the premises to the condition prior to the lease. It seeks legal fees based on the fact that it is the prevailing party in this case.

In opposition, plaintiff argues that the instant motion is improper because issue has not been joined as it did not have a chance to reply to the counterclaims before defendant moved for summary judgment. Plaintiff argues that the failure to restore the premises has prevented it from reletting the entire building and devastated plaintiff's financial condition. It explains that it is seeking to rent the building pursuant to a net lease and substantial renovation has hindered its ability to re-let the property. Plaintiff points out that defendant knew it had removal and restoration obligations but did not do anything to comply with the terms of the lease.

In reply, defendant insists that plaintiff is asking this Court to depart from well-established precedent that a tenant's purported failure to restore the premises upon a tenancy's expiration does not trigger holdover liability. It claims that it reached out to plaintiff to resolve any dispute about the restoration of the premises by agreeing to pay the cost for such work but that plaintiff declined to agree to a resolution of this issue.

## Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Defendant correctly points out that the First Department has held on numerous occasions that a holdover tenancy does not exist simply because repairs must be completed after a premises is surrendered (*Bldg. Serv. Local 32B-J Pension Fund v 101 Ltd. Partnership*, 115 AD3d 469, 472, 981 NYS2d 682 [1st Dept 2014]; *Chem. Bank v Stahl*, 255 AD2d 126, 127, 679 NYS2d 386 [1st Dept 1998]).

Here, there is no dispute that defendant surrendered the premises pursuant to the demand from plaintiff. The Court is unable to find that a holdover tenancy exists where defendant is no longer in possession of the leased building. That plaintiff claims it cannot rent out the building is a question of damages—but it does not support a constructive holdover theory. As defendant points out, plaintiff's argument would permit a landlord to assert a holdover cause of action anytime a tenant failed to remove items from a leased premises. Nothing in the caselaw cited by plaintiff supports that contention.

However, the Court denies the remaining branches of the motion which seek summary judgment dismissing plaintiff's claim for legal fees and for summary judgment on its counterclaims. Dismissal of a single cause of action does not make defendant the prevailing party at this stage of the litigation. Therefore, the branch of the motion for summary judgment dismissing plaintiff's third cause of action for legal fees is denied.

The Court observes that defendant did not even give plaintiff a chance to reply to its counterclaims before moving for summary judgment on these claims. In any event, they are both denied. The first counterclaim for declaratory relief is denied because it seeks a declaration that states, in part, that defendant satisfied all removal and restoration obligations. Clearly, that is in dispute—plaintiff alleges that defendant did not comply with the terms of the lease requiring it to return the premises to the same condition it was in prior to the lease. The second counterclaim for legal fees is denied as the Court cannot yet identify the prevailing party in this action.

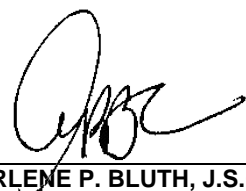
Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted only to the extent that the second cause of action alleged by plaintiff is severed and dismissed, and denied to the remaining relief sought.

Remote Conference: April 7, 2021.

2/10/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE