

Civil Court of the City of New York
County of New York: Part 52

Index Number LT-303169-22/NY
Motion Seq. 001

DOREEN PROPERTIES, LLC &
MAURICE REFOUA,

Petitioner (Landlord),

against

DECK 7-289, LLC,

Respondent-Tenant.

DECISION/ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Papers Numbered
Notice of Motion, Affirmation and Affidavit in Support, and Exhibits.....	1
Affirmation and Affidavit in Opposition, and Exhibits.....	2
Affidavit in Reply and Exhibits.....	3

ILANA J. MARCUS, J.

Petitioner Doreen Properties, LLC & Maurice Refoua commenced this commercial non-payment proceeding seeking to recover possession of the premises located at 289 7th Avenue, Ground Floor, New York, New York 10001 (“subject premises”), based upon the allegation that respondent Deck 7-289, LLC defaulted in the payment of rent and additional rent, and did not cure the default after being served with a Fourteen Day Notice to Tenant on February 1, 2022. Respondent continues in possession without petitioner’s permission. The relief sought in the petition includes the possession of the subject premises with issuance of a warrant to remove respondent therefrom; a money judgment against respondent for all rent and additional rent demanded; and reimbursement of the costs and disbursements of the instant action. The petition is dated March 8, 2022.

Respondent moves to dismiss the action pursuant to CPLR 3211(a), or alternatively, moves for summary judgment pursuant to CPLR 3212. Respondent avers that petitioner failed to comply with the service requirements contained in paragraph 21 of the original lease between petitioner and the original tenants of the property, from which respondent was assigned its interest. Specifically, respondent contends that petitioner failed to serve the rent demand notice and notice of petition

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on respondent's predecessor "Tenant c/o Dunkin Donuts 560 Route 23 North, Pompton Plains, New Jersey 07444, with a copy to Stuart S. Ball, Esq., Westerman Ball Ederer Miller & Sharfstein, LLP, 170 Old Country Road, Mineola, New York 11501" (Resp Mot, Exh C, ¶21). Petitioner opposes the motion.

Respondent submits the affidavit of Paul A. Gauthier, Jr., chief financial officer for respondent; the original lease dated May 27, 2003, between petitioner and the original tenant Metrodough, Inc.; and a lease assignment and assumption agreement dated May 27, 2007, between petitioner and respondent's predecessor-in-interest, Good Clean Donuts. Petitioner submits the affidavit of Daniel Hakakian,¹ member of Doreen Properties, LLC; a lease assignment and assumption agreement dated February 19, 2016, between petitioner and respondent; and a computer print-out indicating that Westerman Ball Ederer Miller & Sharfstein, LLP is no longer located at 170 Old Country Road, Mineola, New York 11501.

CPLR 3211(a) provides for dismissal of the action when a respondent submits documentary evidence that conclusively establishes a defense to petitioner's claim as a matter of law (*Whitestone Constr. Corp. v F.J. Sciame Constr. Co. Inc.*, 194 AD3d 532 [1st Dept 2021]).

CPLR 3212 requires the movant on a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). CPLR 3212(b) provides that a summary judgment motion must be supported by an affidavit of a person with knowledge of the facts, as well as other admissible evidence (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-85 [2005]). Once such a showing is made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 NY2d at 562).

Respondent's motion is without merit. Respondent failed to produce the only lease assignment and assumption agreement to which it was an actual signatory. Nonetheless, in its opposition, petitioner supplied a copy of this document, which unequivocally states in Article VII:

¹ Respondent argues that the Hakakian Affidavit should be stricken because it is an out-of-state affidavit, and it is not accompanied by a certificate of conformity required by RPL 299-a. However, "the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice" (*Capital One, N.A. v Mc Cormack*, 183 AD3d 644 [2d Dept 2020], citing CPRL 2001). As respondent has not argued any prejudice, the Hakakian Affidavit stands.

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NOTICES

7.1. From and after the Effective Date, notices to Tenant under the Lease shall be addressed to Assignee at c/o The Deck Group, LLC, 82 Flanders Road, Westborough, MA 01581, Landlord's notice address is c/o Ron Hakakian at 410 S. Beverly Dr. Beverly Hills, CA 90212.

(Pet Opp, Exh A). This document, dated February 19, 2016, is signed by both petitioner, respondent, and respondent's predecessor-in-interest, Good Clean Donuts (*id.*).

Furthermore, paragraph 21 in the original 2003 lease between petitioner and Metrodough, Inc., on which respondent relies, permits tenant to provide "such other address or addresses as Tenant may from time to time give by notice to Landlord for this purpose" (Resp Mot, Exh C, ¶21). The change of address provided in paragraph 7.1 of respondent's 2016 lease assignment and assumption agreement conforms with this paragraph (*see 54 E. 1st St. Owners Corp. v Prune, LLC*, 20 Misc 3d 54 [App Term, 1st Dept 2008]). "The point of specifying methods by which a notice of default is to be given is, fundamentally, to ensure that the putative defaulter has actual notice and an opportunity to protest the claim of default or, if so provided, to avail itself of an opportunity to cure the default, if any" (*id.* quoting *Gucci Am., Inc. v Sample Sale Wholesalers, Ltd.*, 39 AD3d 271 [1st Dept 2007]). Respondent's argument that petitioner must serve the former tenant and its attorney after that tenant relinquished all rights and obligations it once had as of May 27, 2007, does nothing to further this objective. Respondent is cautioned in making such an argument given the omission of the 2016 lease assignment and assumption agreement, the terms of which conclusively rebut its argument in its motion papers.

As respondent does not deny that it was served with the rent demand notice and notice of petition at c/o The Deck Group, LLC, 82 Flanders Road, Westborough, MA 01581, respondent's motion is denied.

Accordingly, it is

ORDERED that respondent's motion to dismiss is denied; it is further

ORDERED that respondent's motion for summary judgment denied.

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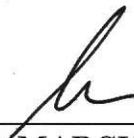
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The parties shall appear for trial at the Civil Court, 111 Centre Street, Part 52, New York, New York 10013, on July 27, 2022, at 9:30 am. The clerk of the court is directed to place the matter on the calendar before any judge of this court.

This constitutes the decision and order of this court.

DATED: June 30, 2022
New York, NY

ENTER:



ILANA J. MARCUS
Judge of the Civil Court

Civil Court
of the
City of New York
JUN 30 2022
ENTERED
NEW YORK COUNTY