

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

CA 522 FULTON LLC,

Plaintiff,

-against-

SCIENCE, LANGUAGE, AND ARTS,

Defendant.

Index No. 652477/2021

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order on Motion of this Court (Schechter, J.S.C.), NYSCEF Doc No. 59, dated December 3, 2021, and entered, and/or electronically filed, with the Court on December 3, 2021.

Dated: Uniondale, New York
December 3, 2021

RIVKIN RADLER LLP
Attorneys for Plaintiff
926 RXR Plaza
Uniondale, New York 11556
(516) 357-3000

By: *Matthew Meisel* /s/
Matthew Meisel, Esq.

TO: ALL APPEARING PARTIES VIA NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER SCHECTER PART 54

Justice

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INDEX NO. 652477/2021

CA 522 FULTON LLC,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

SCIENCE, LANGUAGE, AND ARTS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 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 CHANGE VENUE

There is no basis to transfer this action to Kings County since this is merely an action for non-payment of rent that will not result in a judgment affecting possession or title to real property. In any event, the lease requires that this action must be brought in New York County (Dkt. 25 at 60), and defendant waived its right to seek a change of venue (id. at 41).

There also is no question of fact that defendant is liable for \$6,107,421.03 in unpaid fixed rent and additional rent, and that it is liable for accelerated rent, interest and attorneys' fees.

Defendant did not dispute plaintiff's arguments regarding most of the pleaded affirmative defenses (see Zuckerman v City of New York, 49 NY2d 557, 560 [1980]), including the pandemic's effect on the obligation to pay rent (see 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 [1st Dept 2021]). Defendant merely argues that plaintiff has not submitted indisputable evidence of the amount owed in admissible form and that it is not liable for accelerated rent. Defendant is wrong.

Bragg's detailed affidavit (Dkt. 23) and the tenant ledger (Dkt. 26) constitute sufficient and admissible evidence of the amount owed (Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden, 169 AD3d 569, 570 [1st Dept 2019]; see Chip Fifth Ave. LLC v Quality King Distributors, Inc., 158 AD3d 418, 419 [1st Dept 2018]). Defendant's failure "to refute plaintiff's calculations as to the amount owed, or challenge any specific line-item on the ledger submitted by plaintiff" and its "nonspecific argument that plaintiff's calculations were flawed and uncertain is conclusory, and insufficient to raise a triable issue", thus "entitling plaintiff to summary judgment as to the amount of damages" (Royal Equities Operating, LLC v Rubin, 154 AD3d 516, 517 [1st Dept 2017]; see Moon 170 Mercer, Inc. v Vella, 146 AD3d 537, 538 [1st Dept 2017]). There is no evidence of

payment of any rent that would be a basis for reduction of the amount proven for the time period for which fixed rent and additional rent are sought.

Based on the lease termination (Dkt. 27), there is also no question that plaintiff is entitled to accelerated rent under Article 24(D) of the lease (*see* Dkt. 25 at 40-41). Defendant's contention that it is not liable for additional rent is wrong. The acceleration clause's discount rate renders it consistent with *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.* (24 NY3d 528, 536 [2014]). The argument that a 4% rate is unreasonable is conclusory and unpersuasive, particularly in the current market and the one in 2018. These parties "are well-situated to manage their affairs during negotiations, and to conclude otherwise would patronize sophisticated parties and destabilize their contractual relationships – contrary to New York's strong public policy in favor of freedom of contract" (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 368 [2019]).


Plaintiff, however, failed to respond to defendant's contention that the amount owed under Article 24(D) requires determination "of the then fair net rental value of the Demised Premises" (Dkt. 25 at 41). This requires a hearing with expert testimony. The court will enter judgment in the amount of unpaid fixed rent and additional rent, sever the remaining claims, refer the claim under Article 24(D) to a Special Referee to hear and report after conducting a hearing (and to permit limited fact and expert discovery as the Referee deems necessary with the hope that the parties can agree on such discovery at the outset), and defer determination on the amount of attorneys' fees until after the hearing (*see* Dkt. 25 at 62). To be sure, plaintiff will at least recover fees as the prevailing party on its claims for unpaid fixed rent and additional rent, but since more fees will be expended going forward, the total amount cannot be decided now.

Defendant's other arguments are unavailing.

Accordingly, it is ORDERED that defendant's motion to transfer venue to Kings County is DENIED; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is GRANTED (1) on liability and damages on the claims for rent and additional rent, and the Clerk is directed to enter judgment in favor of plaintiff CA 522 Fulton LLC and against defendant Science, Language, and Arts in the amount of \$6,107,421.03 plus 10% contractual pre-judgment interest from February 9, 2021 to the date judgment is entered and thereafter at the statutory rate, and plaintiff's remaining claims are severed and shall continue; (2) on liability only on the claim under Article 24(D) and an inquest on damages is referred to a Special Referee to hear and report, and plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date, and notify the parties of the time and date of the hearing; and (3) on liability only on the claim for prevailing party attorneys' fees, with

the amount to be determined by the court upon further submissions after the Referee issues a report.

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12/3/2021
DATE

JENNIFER SCHECTER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER