

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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1762-64 FIRST AVENUE OWNER LLC

Plaintiff,

- v -

KRUA SIAM INC.,

Defendant.

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INDEX NO. 159336/2022

MOTION DATE 06/02/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

Plaintiff’s motion for summary judgment is granted.

In this commercial landlord tenant matter, plaintiff seeks summary judgment on its sole cause of action—for breach of contract for failure to pay the rent. Plaintiff claims that defendant (a tenant in a premises it owns) owes nearly \$200,000 in unpaid fixed rent and additional rent.

Defendant points out in opposition that the lease is between two non-parties and it is not bound by the lease. It also insists that the supporting papers were not properly authenticated and that plaintiff has not met its prima facie burden for summary judgment. Defendants claims that discovery is necessary.

In reply, plaintiff claims that personal knowledge about the exhibits it attached is not required on a motion for summary judgment and that the failure by defendant to obtain a formal written assignment does not entitle defendant to evade its obligation under the lease. Plaintiff emphasizes that defendant signed a purchase of business agreement with the former tenant (to take over operation of the business), it was assigned the lease and defendant held itself out as the

tenant. It emphasizes that it did not need to send a rent demand before starting this action and that no discovery is required.

Discussion

The Court grants the motion. As an initial matter, there is no question that the lease was between two non-parties to this action: the landlord was identified as 1762-1764 First Avenue Real Estate Corp. (a different entity than plaintiff) and the tenant was specified as A&A, 888 Inc (NYSCEF Doc. No. 11). However, defendant entered into an estoppel certificate dated January 22, 2020 in which it identified itself as the tenant for the subject premises, noted that it took an assignment to the lease, and that plaintiff was the landlord (NYSCEF Doc. No. 13). Defendant cannot sign such an agreement where it holds itself out as the tenant and bound by the terms of the lease only to later suggest there was no assignment when it stopped paying the rent. Although defendant is correct that plaintiff did not include a written assignment in its moving papers, that is not sufficient to avoid the representations in the estoppel certificate. Defendant did not include anything from someone with personal knowledge (only an attorney's affirmation is included) to raise a material issue of fact concerning the assignment mentioned in the estoppel certificate.

The Court observes that defendant did not specifically mention its affirmative defenses or its counterclaim for legal fees in the opposition, except for the privity of contract argument with respect to the lease discussed above. In any event, defendant's affirmative defenses and counterclaim are wholly without merit and do not constitute a cognizable defense to the failure to pay rent. To the extent that defendant asserts that Covid-19 shutdowns permitted it to stop paying rent, the Court observes that this argument has been rejected by the Appellate Division, First Department (*558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 149 NYS3d 55


[1st Dept 2021] [observing that the pandemic did not justify the failure to pay rent under the doctrines of frustration of purpose or impossibility).

Defendant’s assertion that plaintiff failed to properly authenticate its documents is without merit. Plaintiff met its prima facie burden through the affidavit of Daniel Hochberg (the director of property management for plaintiff) (NYSCEF Doc. No. 9). Moreover, defendant also did not dispute the amount of money sought by plaintiff and so the Court grants the amount demanded in the moving papers.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted, defendant’s affirmative defenses and counterclaim are severed and dismissed and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$192,747.88 plus statutory interest from November 1, 2022 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff shall make a separate motion for such fees on or before June 28, 2023.

<u>6/6/2023</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE