

# Monica King Contemporary LLC & v. Kedzkidz Realty II

Supreme Court of New York, New York County

January 27, 2022, Decided

INDEX NO. 657042/2020

MONICA KING CONTEMPORARY  
LLC AND, MONICA KING,  
Plaintiffs, v. KEDZKIDZ REALTY II,  
LLC, Defendant.

[Michael John Ciarlo, Esq.](#) | [Nadel and Ciarlo, P.C.](#), Counsel for the Plaintiff.

**Judges/Opinion:** ARLENE BLUTH,  
J.S.C., Judge.

## Opinion

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### DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 84, 85 were read on this motion to/for JUDGMENT - SUMMARY .

Plaintiffs' motion for partial summary judgment on their first cause of action for a declaratory judgment that no sums are due to the defendant through January 10, 2021 and to dismiss the first (in part), second, third and fourth counterclaims is granted.

## Background

Plaintiffs, a corporate tenant and individual "good guy" guarantor, bring this case concerning a lease they entered into with defendant (the landlord). Plaintiff King insists that because of the ongoing pandemic, she invoked a provision of the lease that permitted her to terminate the lease and surrender the premises with six months' notice. King explains that she has paid all amounts she believes are due under the lease in order to meet her obligations under the good guy guaranty.

The guarantor's obligations only end when all money due to the landlord are paid. Plaintiff guarantor believed she paid all money due, but the landlord was claiming a lot more was due. The Court previously granted plaintiffs' motion for a preliminary injunction and stressed that plaintiffs should have the opportunity to figure out how much is due on the lease while not racking up additional monies owed to the defendant. Plaintiffs were concerned that the landlord was arguing about the amount owed in order to keep them on the hook for continuing rent, and plaintiffs sought to "stop the bleeding." Plaintiffs simply wanted the chance to pay what was owed and move on without incurring significant additional arrears based solely on the fact that the parties disagreed over how much was due. This Court granted that request.

Plaintiffs now move for partial summary judgment. They claim that they tried to negotiate a temporary amendment to the lease, given the ongoing pandemic and their inability to operate the business, but that an agreement could not be reached. Therefore, plaintiffs sent a formal notice to terminate the lease on July 10, 2020 with the required six months' notice as required under the lease. They vacated within the six months

Plaintiffs explain that defendant's attorney sent a letter in July 2020 stating that \$147,183.36 was due and challenges certain charges in that letter. However, they point out that defendant's answer only alleges that \$76,183.49 is due from the guarantor (Ms. King) and that plaintiffs have surrendered the security deposit in the amount of \$81,885.00. Plaintiffs also argue that defendant acknowledged plaintiffs' surrender of the premises on January 10, 2021.

Plaintiffs seek summary judgment on their first cause of action which seeks declaratory relief concerning how much plaintiffs owe. They also seek to dismiss defendants' first and second counterclaims, which concern the amounts due, as well as dismissal of the third and fourth counterclaims for legal fees.

In opposition, defendant contends that plaintiff is asking this Court to ignore an entire article within the lease concerning the rent credit and that plaintiffs owe at least \$30,543.44 prior to the date plaintiffs terminated the lease. Defendant insists that plaintiffs failed to satisfy her good guy guaranty because plaintiffs owed money when they left the premises.

## 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 *bona fide* 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]).

The parties agree that there are essentially six separate areas of dispute and so this Court will consider each one in turn.

First, the parties disagree about whether plaintiff should have to pay back a \$26,500 "rent credit." This concerns section 40(D)(2) of the lease (NYSCEF Doc. No. 64). This section states that "Provided Tenant is not in default (beyond all applicable notice and cure periods) of any provisions of this Lease, Tenant shall not be obligated to pay Base Rent for the first sixty (60) days

beginning from the Commencement Date. Notwithstanding the foregoing, in no event shall the rent payments commence earlier than September 1, 2019. Provided, however, Tenant shall remain fully obligated during such period for all Additional Rent set forth in this Lease, including but not limited to, payments for utilities and real estate taxes as set forth in Article 41 hereinbelow" (*id.*). It also provides that defendant "shall also be entitled to the repayment of any rent credit theretofore enjoyed by the Tenant, which sum shall be deemed Additional Rent" if the "Tenant, at any time during the term of this Lease after Tenant has been granted all or a portion of the rent credit described in in this Article, breaches any covenant, condition or provision of this Lease . . . and fails to cure such breach within any applicable notice and grace period" (*id.*).

Plaintiffs contend that no rent credit was ever given and focuses on the fact that this provision states that no rent was due before September 1, 2019. Defendant insists that the Court must read the entire section and that a rent credit was provided for July and August of 2019.

The Court agrees with plaintiffs' reading of the lease and finds that the \$26,500 was not a rent credit. As plaintiffs point out, the first invoice they received for the premises was for partial rent in September (NYSCEF Doc. No. 66). A plain meaning and understanding of a rent credit is a payment that gets applied to some future bill. Here, the provision the parties focus on provides that a rent credit would have to be paid back should one be given. But it also specifically states that no rent was due before September 1, 2019. The Court fails to see how that was a rent credit and instead finds it was a concession because, as plaintiffs point out, the premises were not turned over in a timely fashion to plaintiffs. And defendant doesn't point to any documents showing that there was anything one might consider a credit or that

the parties treated it anything like a rent credit.

Besides, as this decision makes clear, all rent was paid until the date of vacatur and so there was no breach on or before the date of vacatur. So whatever it is called, there was no obligation to pay it back because there was no breach by either plaintiff.

Second, the parties disagree about the broker's commission. Plaintiffs argue that paragraph 44 of the lease states that it is the responsibility of the defendant (as the landlord) to pay the \$44,000 commission. Defendant now concedes this point and so the Court concludes plaintiffs do not owe this amount.

Third, the parties dispute the \$350 legal fee allegedly accrued from counsel for defendant's reply to plaintiffs' July 2020 termination letter. Plaintiffs argue that legal fees are only recoverable under paragraph 19 of the lease in connection with instituting, prosecuting or defending an action in which defendant prevails. Defendant points to a different provision of the lease (paragraph 53[B]) which requires plaintiffs to indemnify defendant for any "costs, charges and expenses, including reasonable attorneys' fees, which may be imposed or incurred by or asserted against Landlord by reason of . . . any failure on the part of the Tenant to perform or comply with any of the agreements, terms or conditions contained in the Lease" (NYSCEF Doc. No. 64).

The Court disagrees with defendant's interpretation of paragraph 53(B). Plaintiffs' decision to terminate the lease was permitted under the parties' agreement. That did not constitute a failure to perform under the terms of the lease. Plaintiffs merely utilized an agreed-upon term. If defendant hired a lawyer to write claiming almost \$150,000 was due (when it was not), then that does

not fall under 53(B). And defendant cannot recover under paragraph 19 either, as the \$350 fee did not arise within the context of a litigation in which defendant prevailed.

Fourth, the parties disagree about the \$1,325 late fee and \$417.38 in interest on the repayment of the rent credit. Having found that plaintiffs did not owe the rent credit, the Court now finds that plaintiffs do not owe these requested amounts.

Fifth, the parties dispute whether plaintiffs owe a \$1,325 late fee and \$626.06 in interest on the May and June 2020 rent payments. Plaintiffs admit they did not make those payments timely but argue that by the time counsel for defendant sent his July 30, 2020 letter, those payments had been made. Plaintiffs explain that the base rent for May, June and July 2020 was paid on July 9, 2020 and there was no interest or late fees included on any invoices. Plaintiffs also point to a letter dated March 31, 2020 stating that defendant was sending an April 2020 invoice but it was not "soliciting collection at this time." Plaintiffs claim this was a product of the ongoing pandemic and demonstrates defendant was not seeking to recover the rent due.

Defendant emphasizes that the May and June 2020 rent payments were late and the terms of the lease permit it to seek late fees and interest for those late payments.

The Court finds that defendant waived its right to recover the late fees and interest on the May and June 2020 rent payments. As plaintiffs point out, the invoices sent to plaintiff for those months did not include any late fees or interest from previous months (NYSCEF Doc. No. 70). And by the time defendant sent anything (which was in response to plaintiffs' termination notice) the amounts due had already been paid in full. The Court declines to permit defendant to suddenly seek amounts it declined to seek

previously only once plaintiffs sought to terminate the lease in accordance with the parties' agreement. The fact is that plaintiffs made the payments before defendant sought to impose the late fees and interest payments.

In their first cause of action, the Court finds that defendant will not prevail in this action (even if they recover additional money against the corporate defendant) as required under paragraph 19 of the lease. The fact is that this case was initiated by plaintiffs to essentially "stop the bleeding" while they tried to pay what was owed before vacating the premises. They have successfully done that and so legal fees are not appropriate for defendant.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs for partial summary judgment is granted in all respects and the second, third and fourth counterclaims are severed and dismissed and the first counterclaim is dismissed only to the extent defendant seeks to recover monies owed by Monica King Contemporary LLC prior to the termination date; and it is further DECLARED that other words, probably due to the pandemic, the defendant sent bills but did not seek immediate collection. It was only after plaintiff paid it anyway, and gave the six months' termination notice, that the defendant tried to charge interest and late fees. Under these circumstances, the Court finds that no late fees or interest is due for May or June 2020.

Sixth, plaintiffs contend that they paid the base rent from August 1, 2020 through the termination date. Defendant acknowledges this assertion in its opposition and so plaintiffs do not owe any additional monies for the base rent.

The Court also agrees with plaintiffs that none of defendant's affirmative defenses

compel the Court to deny this branch of the motion. The Court finds that plaintiffs are entitled to summary judgment on their first cause of action for a declaration that all amounts owed prior to the termination date were paid and plaintiff Monica King (the guarantor) does not owe any money to defendant.

### **Counterclaims**

Plaintiffs seek summary judgment dismissing the portion of the first counterclaim that seeks to recover monies owed by the corporate defendant (the Tenant) from before the Termination Date. The Court grants that branch of the motion for the reasons stated above.

Plaintiffs demonstrated that they paid what was owed prior to the date they left the premises in accordance with their termination notice.

For the same reasons, the Court dismisses the second counterclaim which seeks recovery against Monica King individually as the guarantor. As stated above, plaintiffs paid what was owed.

The Court also dismisses the third and fourth counterclaims which seek legal fees against both defendants. As plaintiffs have prevailed plaintiff Monica King Contemporary LLC owes no money to defendant KedzKidz Realty II LLC through the termination date under the terms of the lease; and it is further

DECLARED that plaintiff Monica King owes no money to defendant KedzKidz Realty II LLC and has fully satisfied all her obligations under the subject guaranty.