

**115 E. St. LLC v Ivy League Place, Inc**

2024 NY Slip Op 33988(U)

October 30, 2024

Supreme Court, Kings County

Docket Number: Index No. 534452/2022

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the 30th day of October 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X  
115 E. 52 ST. LLC,

Index No.: 534452/2022  
Mot. Seq. 3

Plaintiff,  
-against-

IVY LEAGUE PLACE, INC & TANESIA SPENCE

Defendants.  
-----X

2024 NOV - 8 A 10: 2  
KINGS COUNTY CLERK  
FILED

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff’s Notice of Motion for Summary Judgment; Attorney Affirmation of Ashley M. Elenio, Esq., affirmed on November 15, 2023; Affidavit of Kwadjo Wordie sworn to on November 13, 2023; Exhibit 1-Deed; Exhibit 2-Lease; Exhibit 3-Guaranty; Exhibit 4-Summons and Complaint; Exhibit 5-Affidavit of Service-Ivy League; Exhibit 6-Affidavit of Service-Tanesia Spence; Exhibit 7-Answer; Exhibit 8-Reply to Counterclaims; Exhibit 9-Motion for Default Judgment; Exhibit 10-Stipulation to Extend Time to Answer; Exhibit 11-Letter Withdrawing Motion for Default Judgment; Exhibit 12-Tanesia Spence’s Answer; Exhibit 13-Reply to Counterclaims; Exhibit 14-Order to Show Cause; Exhibit 15-E-courts; Exhibit 16-Notice of Appearance; Exhibit 17-Petition; Exhibit 18-Civil Court Judgment.....	41-62
Defendant Ivy League Place, Inc.’s Attorney Affirmation in Opposition affirmed by James Tamale, Esq., on November 18, 2023; Exhibit A-Deed; Affidavit of Glen Felix in Opposition sworn to on December 13, 2023; Exhibit B-Certificate of Occupancy; Exhibit C-Emails; Exhibit D-Plumbing Supplies Email.....	63-69
Attorney Affirmation in Reply affirmed by Ashley M. Elenio Esq., on February 15, 2024; Exhibit 19-Deed; Exhibit 20-Housing Court Answer.....	71-73

MONTELIONE, RICHARD J., J.

The plaintiff previously brought a special proceeding in housing court, commenced on September 9, 2020, in the matter *115 E. 52 St LLC, petitioner v. Ivy League Place Inc., respondent*, under Index No. LT-302140-2020/KI which resulted in a possessory and monetary judgment in its favor that was entered on June 27, 2022. Defendant Ivy League Place, Inc. (Ivy League Place) was found to have failed to pay rent for 19 months. (NYSCEF #1). The monetary judgment was in the amount of \$110,073.00. Defendant Tanesia

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Spence was not a named party in the prior proceedings. The demised premises are located in the basement space located at 115 East 52nd Street, Brooklyn, NY 11203 (premises). Plaintiff now seeks use and occupancy for months of July 2022, August 2022, September 2022, October 2022, November 2022, December 2022, January 2023, and February 2023, in the amount of \$27,520.00 (\$3,440.00 per month for 8 months). There appears to be no dispute that the defendant Ivy League Place removed itself from the premises sometime in February 2023.

The instant action was commenced by filing the summons and complaint on November 25, 2022, seeking a judgment for use and occupancy for the same demised premises but for a subsequent period of use and occupancy. Issue was joined by service of the answer on behalf of defendant Ivy League Place on February 1, 2023, and by defendant Tanesia Spence (Spence) on June 21, 2023 (defendants). Plaintiff now moves for summary judgment pursuant to CPLR 3212.

In December 2008, Kwadjo Wordie (Wordie) became the owner of the premises. (NYSCEF #72). In May 2016, Wordie deeded the property to the plaintiff 115 E. 52 St. LLC, an entity that he alleges to own and operate as a managing member. (NYSCEF # 44). Around June 26, 2015, plaintiff entered into a lease agreement with Ivy League Place, which was signed by both Glen Felix, the managing owner of Ivy League Place, and plaintiff by Wordie. (NYSCEF #45). According to said lease agreement, defendant Ivy League Place leased the premises for a five-year term that would commence on July 1, 2015, and end on June 15, 2020. (NYSCEF #45 Pg 1). Additionally, the agreement laid out specific terms related to the amount of rent Ivy League Place was supposed to pay, the conditions regarding late payment, the way in which the premises was to be used, details regarding indemnification, and details in the event of a default in performance of the agreement. (NYSCEF #45 Pgs. 1-2, 7). There is a document dated September 10, 2015, captioned, "Guaranty of Payment," with the name of the guarantor being "MR. GLEN FELIX" (capitalized in the original). But paragraph one lists "Tanesia Spence" as the one who will "...guarantee the tenant's performance." (NYSCEF #46). The paragraph above the notary signature is blank regarding the person who appeared before the notary and reflects, "On 9/12/15 before me, the undersigned, personally appeared \_\_\_\_\_<sup>1</sup> personally known to me..." This inconsistency raises an issue of fact about whether Spence is the guarantor, signing for Glen Felix, also named on the guarantee but who did not sign, or whether she in fact signed the instrument. The issue is further compounded by the notary section, where it is not indicated *who appeared before the notary* when the document was signed and stamped. A party's acknowledgment before a notary is not necessary to make the guarantee legally binding on the parties. *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985]. Notwithstanding, when a notary is used there is a critical need to confirm the identity of the signer. *Galetta v Galetta*, 21 NY3d 186 [2013]. Here, the guarantee specifically mandates, "Guarantor please attach a copy of your State issued photo ID or Driver's License. This guaranty form must be notarized." The lack of a photo ID or Driver's license and the notarial deficiencies raise an issue of fact as to the signature and its legal significance in the guarantee.

According to the guaranty agreement, the guarantor had a duty to perform according to the terms of the lease in the event that Ivy League Place defaulted in its performance. (NYSCEF # 46 ¶¶s 2, 5).

Plaintiff now seeks additional damages for the failure of the defendants to pay use and occupancy for the period of time including the months of July, August, September, October, November, December of 2022, and January and February of 2023. (NYSCEF #42). Plaintiff seeks use and occupancy for these months at

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<sup>1</sup> Blank line in the original.

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\$3,440.00 per month for 8 months for a total of \$27,520.00 together with late fees of \$1,200.00 and attorneys' fees as well as costs and disbursements.

The defendants assert that plaintiff did not own the premises when the lease in question was executed and therefore plaintiff does not have standing. (NYSCEF #63). Inasmuch as this court takes judicial notice of the possessory and monetary judgment entered in favor of the plaintiff against defendant Ivy League Place, and plaintiffs implicitly argue collateral estoppel because standing was never raised in the prior proceedings, defendants are collaterally estopped from now arguing that the plaintiff lacks standing. (See *Lennon v. 56th and Park (NY) Owner, LLC*, 199 AD3d 64, 69, 153 NYS3d 535, 541 [2d Dept 2021]. "The party seeking to avoid application of the doctrine has the ultimate burden of establishing the absence of a full and fair opportunity to have litigated the earlier matter" (*Id.* See also *Matter of Dunn*, 24 NY3d 699, 704, 3 NYS3d 751, 27 NE3d 465 [2015]; *Moran v. County of Suffolk*, 189 AD3d 1219, 1221, 138 NYS3d 92 [2d Dept 2020]; *Suter v. Ross*, 179 AD3d 1127, 1129, 118 NYS3d 188 [2d Dept 2020]; *HSBC Bank USA, N.A. v. Pantel*, 179 AD3d 650, 651, 116 NYS3d 336 [2d Dept 2020]; *Bank of N.Y. Mellon v. Chamoula*, 170 AD3d 788, 790, 96 NYS3d 148 [2d Dept 2019]).

Under CPLR Law 3212 (b), the moving party must establish that there is a cause of action or defense at issue to warrant a judgment in their favor as a matter of law. The moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact. (See *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Furthermore, with regard to breach of contract, to establish a *prima facie* claim for breach of contract, a plaintiff must establish the existence of a contract, that plaintiff performed pursuant to the contract, that defendant breached its contractual obligations, and that plaintiff was damaged because of the breach. (*Dee v Rakower*, 112 AD3d 204 [2d Dept 2013]).

The court now addresses the plaintiff's motion for summary judgment, seeking a ruling in its favor on seven causes of action against the defendants. The primary allegations by the plaintiff include claims for unpaid rent, late fees, legal fees, and the amount owed from the date subsequent to the related judgment obtained in Housing Court. In response, the defendants argue that the debt has been settled, the plaintiff has failed to state a claim for relief, they were innocent infringers, the plaintiff did not mitigate damages, and there was an abuse of process, among other defenses. Additionally, each defendant brings counterclaims against the plaintiff, including unjust enrichment, breach of contract, and fraudulent misrepresentation.

The court must determine whether the plaintiff had a valid contract with Ivy League Place and an enforceable guarantee with Spence. A contract is a legally enforceable agreement that requires certain essential elements, including the capacity to contract, mutual assent, and definiteness in material terms. These elements ensure that the parties are bound by their agreement and that the terms are clear and enforceable. (See *J. B. Preston Co. v Funkhouser*, 261 NY 140 [1933]; *Komp v Raymond*, 175 NY 102 [1903]).

The plaintiff's first cause of action alleges that Ivy League Place failed to pay use and occupancy for each of the months of July through December 2022, and January and February 2023. Additionally, the plaintiff claims that Ivy League Place breached their contract by not paying rent for these months. The plaintiff has made a *prima facie* showing of breach and ongoing damages by providing a copy of the lease and an affidavit from Wordie. Furthermore, a decision and order issued by Hon. Heela D. Capell supports

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this claim, finding that the Ivy League Place breached their contractual obligations by overstaying the lease period and defaulting on rent payments.

In response, Ivy League Place raises several affirmative defenses, including claims that they have already paid their debt and that the plaintiff failed to mitigate damages. However, Ivy League has not provided any evidence to support these affirmative defenses, such as proof of payment. Moreover, this is a commercial lease with no requirement for remediation of damages in the event of a breach under the terms of the agreement and therefore there is no viable defense based on mitigation. *See L'Aquila Realty, LLC v Jalyng Food Corp.*, 148 AD3d 1004, 50 NYS3d 128 [2d Dept 2017]

Regarding their breach of contract counterclaim, Ivy League Place alleges that they were misled into signing the lease through fraudulent misrepresentations, specifically concerning the requirement for a Certificate of Occupancy. They claim that the plaintiff failed to ensure the premises met the necessary code requirements to operate a daycare for 25 children and unfairly left the responsibility for renovations to Ivy League Place. Additionally, they allege that the rent was charged at commercial rates when it should have been classified as residential. The second counterclaim is for fraudulent misrepresentation, in which Ivy League Place alleges that the plaintiff falsely assured them they could accommodate more than 16 children on the premises and failed to inform them of the need for a Certificate of Occupancy to permit a larger number of children. Finally, Ivy League Place brings a third counterclaim for unjust enrichment, based on the same reasons detailed above.

The claims brought forward by Ivy League Place specifically regarding unjust enrichment and breach of contract are two concepts that are fundamentally in opposition with each other. Unjust enrichment is only viable in the absence of an actual agreement. (*See Pierce Coach Line, Inc. v Port Washington Union Free Sch. Dist.*, 213 AD3d 959 [2d Dept 2023]). Here, it is undisputed that a lease agreement, signed by both parties, exists, and therefore the counterclaim for unjust enrichment must be dismissed. Moreover, the lease explicitly states that the premises are provided "as is" (NYSCEF #45 ¶ 1). The plaintiff made no written guarantees that the Ivy League Place's daycare could accommodate 25 children, nor that obtaining the Certificate of Occupancy would allow for a higher occupancy (NYSCEF #71).

Regarding Ivy League Place's fraudulent misrepresentation claim, to succeed on such a claim, it must be shown that (1) a misrepresentation or a material omission of fact was false and known to be false by the plaintiff, (2) made for the purpose of inducing the defendant to rely upon it, (3) justifiable reliance by the defendant on the misrepresentation or material omission, and (4) resulting injury or damage. (*See Ross v DeLorenzo*, 28 AD3d 631 [2d Dept 2006]). Ivy League Place alleged that the plaintiff lied to them stating it could allow more than 16 children on the premises and that they were never told to get a certificate of occupancy that would allow for a large number of children from staying in the premises. The issue the court has with this claim made by Ivy League Place is that there are very few facts to support this argument. Ivy League Place in their reply to the motion mentioned a certificate filed by the plaintiff one year prior to the signing of the lease involving the American with Disabilities Act ("ADA"). Ivy League Place does not provide any evidence of this, they do not show the certificate that was filed, and their argument related to the ADA is unclear as to how this is related to fraud. Plaintiff has met its burden of showing breach of contract and defendant Ivy League Place has failed to raise an issue of fact by presenting any evidence to meet its high burden by showing fraud. Therefore, the plaintiff has made a *prima facie* showing that there was a lease agreement between the two parties, that plaintiff performed properly according to their contractual duties,

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and that Ivy League Place did not perform by failing to pay rent or use and occupancy. Therefore, Ivy League Place's counterclaims must be stricken.

The second cause of action that the plaintiff asserts is entitlement for late fees in relation to the months that Ivy League Place stayed on the premises. Due to the nature of the request the court must determine if the late fee is permissible or if it is a penalty. As a general matter, parties are free to agree to a liquidated damages clause "provided that the clause is neither unconscionable nor contrary to public policy" (See *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528 [2014]). In order for a late fee to be considered a penalty it must be grossly disproportionate to the damages of the missed payments. In *Trustees of Columbia Univ. in the City of NY v. D'Agostino Supermarkets, Inc.*, 33 N.Y.3d 904, 124 N.E.3d 256, 100 N.Y.S.3d 706 (Table), 2019 WL 1998125 (N.Y.), 2019 N.Y. Slip Op. 69658 [2019] the court was presented with this exact issue when the plaintiff had a late fee provision that at the time the case was decided amounted to \$1 million dollars. This amount stood in stark contrast to the actual damages that were being alleged in the amount of \$175,751.73 plus interest. The court struck down the late fee provision finding it to be a punishment rather than a fair compensation for the actual loss that the plaintiff suffered. In the present case plaintiff is arguing that they are entitled to \$1,200 in late fees related to the eight months that Ivy League Place occupied the premises. When comparing this amount to the amount of rent that the plaintiff is alleging is due, which is \$27,520 plus interest, the late fees do not appear unreasonable. Accordingly, this court finds that the \$1,200 late fee is not a penalty.

The third cause of action brought against Ivy League Place for an award of reasonable legal fees in accordance with paragraph 30 of the lease. Paragraph 30 of the lease states that:

Tenant shall and will on written demand, repay to Landlord as additional rent, any amount that Landlord may be obligated to pay for any such damages and the cost and expense of any action or legal proceedings brought against the landlord by reason of or in respect to any claim for such damages, including but not limited to reasonable attorneys' fees and disbursements expended in connection therewith. (NYSCEF #45)

Based on the unambiguous language in this provision of the lease, the plaintiff is entitled to an award of reasonable legal fees since this action both involved and affects Ivy League Place and their respective lease.

Based on the foregoing, it is

ORDERED that plaintiff 115 E. 52 St. LLC's motion for summary judgment is GRANTED against defendant Ivy League Place, Inc. and plaintiff shall have judgment against defendant Ivy League Place, Inc. in the amount of \$27,520 for July 2022, August 2022, September 2022, October 2022, November 2022, December 2022, January 2023, and February 2023, together with contractual late fees of \$1,200.00, statutory interest calculated by the clerk from November 1, 2022, an intermediate date, and costs and disbursements; and it is further

ORDERED that defendant Ivy League Place, Inc.'s and defendant Tanesia Spence's motion for summary judgment is denied as academic except there remains a legal issue as to the liability of defendant Tanesia Spence under the personal guarantee; and it is further

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ORDERED that counsel for defendants shall file a substitution of counsel form forthwith inasmuch as the Order to Show Cause requesting Kevin S. Golding be relieved as counsel dated July 11, 2023, was denied for failure to appear; and it is further

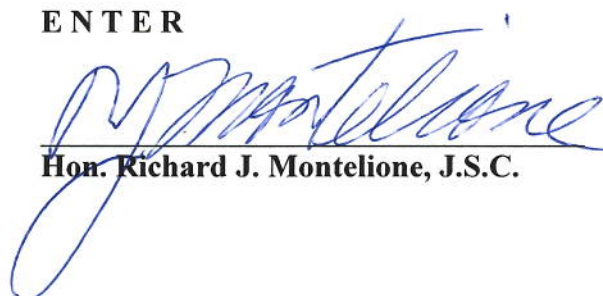
ORDERED that the action against defendant Tanesia Spence, involving only the issue of her liability under the guarantee, shall be severed and separately tried pursuant to CPLR 603, and shall be referred to a Referee to hear and report, or upon consent of the parties, to hear and determine; and it is further

ORDERED that plaintiff shall settle a judgment on notice and include an attorney affirmation of legal services provided by plaintiff's counsel to the plaintiff, and sufficient information that will allow the court to determine reasonable attorneys' fees and defendant's counsel shall provide any opposing papers to the amount of reasonable legal fees claimed by the plaintiff; and it is further

ORDERED that all other requests for relief are denied.

This constitutes the decision and order of the Court.

**ENTER**



**Hon. Richard J. Montelione, J.S.C.**

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