50 Murray St. Acquisition LLC v Ernst Klein 6th Ave. Foods Inc.
2026 NY Slip Op 30200(U)
January 13, 2026
Supreme Court, New York County
Docket Number: Index No. 656622/2020
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

----------X

50 MURRAY STREET ACQUISITION LLC,

Plaintiff,

- v -

ERNST KLEIN 6TH AVE. FOODS INC., PAUL S. CONTE

Defendant.

----------X

INDEX NO. 656622/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISSAL.

Defendant Conte's motion to dismiss is denied and the cross-motion for summary judgment is granted.

Background

Plaintiff, a landlord, brings this action to recover the amounts due from defendant Ernest Klein 6th Ave. Foods, Inc. ("Tenant") and Conte, the guarantor. It insists that the Tenant has not paid any rent since April 2020 and that the Tenant abandoned the premises in September 2020.

Conte moves to dismiss on the ground that he was not properly served. He claims that the address where service was allegedly attempted—a premises in Searingtown, New York—had not been his usual place of abode for more than five years. Conte attaches an affidavit in which he claims he has not lived at that address since his divorce was finalized.

Plaintiff cross-moves for summary judgment. It contends that it is entitled to recover the unpaid rent under the terms of the lease. Plaintiff wants to recover the full term of the lease, which ran through December 2023. With respect to the service issue, plaintiff contends that

defendant Conte waived his right to make such a motion by not timely filing it. Plaintiff points out that defendant Conte answered on January 15, 2021 and that his answer asserted lack of jurisdiction as his first affirmative defense. This motion was not filed until April 15, 2021, well beyond the 60 day limit in the CPLR.

In reply, defendants contend that it a major part of its business was a ready-to-eat café at the premises and that the café took a significant financial hit due to the COVID-19 pandemic. They claim that their revenues dropped dramatically as customers no longer came to the café or the market. Defendants observe that their revenue dropped 65% by the end of April 2020 and to 81% by July 2020. They insist that the landlord was unwilling to work with them on the ongoing rent payments given the economic conditions.

Defendants argue that plaintiff sent an unlawful eviction notice (unlawful allegedly due to the eviction moratorium in place at the time) and they eventually decided to comply and left the premises in late September 2020. They contend that the plaintiff received a significant benefit in recapturing vacant space. Defendants argue that the guarantee is unenforceable under an Administrative Code provision that barred enforcement of such guarantees on individuals.

Discussion

Before the Court gets to the merits, the Court must address the elephant in the room: the fact that this motion was fully briefed in May 2021 and nothing happened. This Court discovered this motion after the case was reassigned in mid-December 2025. There is no excuse for such an absurd delay and, on behalf of the court system, this Court can only profusely apologize, get to the merits and decide the motion.

Motion to Dismiss

CPLR 3211(e) required defendant Conte to make the instant motion within 60 days after raising the purported improper service issue in his pleading. The pleading is dated January 15, 2021 and the instant motion was filed on April 15, 2021. That makes this motion untimely.

Conte contends that there was undue hardship that excuses his failure to timely file the instant motion because of the COVID-19 pandemic. The Court finds that argument is without merit. Defendant Conte could have, if he chose, made the instant motion to dismiss instead of filing an answer. Instead, he was able to upload the pleading and assert an affirmative defense based on lack of jurisdiction. That he had difficulty, as did almost all New Yorkers, navigating the pandemic, is not a basis to find that there was undue hardship. That is simply too vague and conclusory of reason to overlook a clear deadline, particularly when he had the ability to find a lawyer and ensure an answer was filed. Moreover, all of the executive orders staying deadlines based on the pandemic expired in November 2020 and so while the pandemic presented challenges, it is not a catch-all for ignoring a clear deadline.

Cross-Motion

The Court grants plaintiff's cross-motion for summary judgment. On these papers, there is no dispute that the Tenant stopped making payments and that plaintiff (as the landlord) is owed unpaid rent. Defendants did not raise a material issue of fact in opposition.

Although they contend that they surrendered the premises, the fact is that the guarantee was limited only to the extent that Tenant was fully paid up by the surrender date (NYSCEF Doc. No. 33, ¶ 2). Defendants do not contend that the Tenant had made all of its payments prior to the surrender and so Conte is not absolved of his obligations under the guarantee. And

plaintiff included photographs showing that the premises was not left in "broom clean condition" as required in order to enforce the limitation on the guaranty (*id.*, NYSCEF Doc. No. 35).

Defendants also point to an Administrative Code section, 22-1005, that barred recovery against individual guarantors during the pandemic who met certain requirements. However, after this motion was fully briefed, a federal court found this law to be unconstitutional as it violates the Contracts Clause of the United States Constitution (*Melendez v City of New York*, 20-CV-5301 (RA), 2023 WL 2746183, at *16 [SD NY 2023]). The federal court concluded that this law "violates the Contracts Clause by rendering the guaranty clauses in Plaintiffs' commercial leases unenforceable for unpaid rent during the covered period, March 7, 2020 and June 30, 2021" (*id.*).

And while the Second Circuit, in *Bochner v City of New York* (118 F 4th 505 [2d Cir 2024]), vacated the district court's grant of summary judgment as applied to the *Melendez* plaintiff, that decision was only on standing grounds and did not disturb the finding that this Administrative Code section is unconstitutional. This Court could not find any binding appellate caselaw that upheld the validity of this law although some appellate courts have acknowledged this is a live issue without expressly ruling on it (*see Tamar Equities Corp. v Signature Barbershop 33 Inc.*, 223 AD3d 421, 424 [1st Dept 2024]). Here, the relevant Administrative Code applies as defendants ran a café/market that was required to cease serving patrons under the relevant executive order and the default occurred between March 7, 2020 and June 30, 2021 (*see* Administrative Code § 22-1005).

This Court sees no reason to depart from the well-reasoned opinion in *Melendez* and so the Court here finds that the personal guarantee remains viable. In particular, the federal court emphasized that this law did not temporarily impair contracts (which might be permissible); rather, it permanently extinguished an obligation in a private contract (*Melendez*, 668 FSupp3d at

200). The federal court also pointed out that there was no evidence on the record to justify exclusively allocating the entire economic burden from the pandemic on landlords and questioned the justification that this law would incentivize negotiation to keep tenants in leased premises (*id*.). Understandably, the federal judge noted that it might actually deter negotiation as the guarantor was free and clear of any liability (*id*.). These persuasive arguments all apply here and compel the Court to enforce the personal guarantee.

To the extent that defendants seek to excuse their non-performance in failing to pay rent because of the pandemic, courts have uniformly held that the concepts of frustration of purpose and impossibility are not a valid basis to avoid the obligation to pay rent (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577, 151 NYS3d 37) [1st Dept 2021]). Moreover, defendants' affirmative defenses are all without merit and are dismissed.

Summary

The Court finds that defendants are liable, jointly and severally, for the unpaid rent owed under the lease. And although years have passed since the height of the pandemic, that does not lessen the severe economic impacts felt by all types of businesses, including the market run by defendants. But that hardship did not vitiate the obligation to pay rent. And defendants did not raise a material issue of fact that could compel the Court to deny the cross-motion. That plaintiff may not have been willing to accept defendants' attempt to surrender is not a reason to deny plaintiff's application. And defendant did not attempt to surrender in the way the lease contemplated would satisfy the guarantee (including rent paid to date and left in broom clean condition).

Accordingly, it is hereby

ORDERED that defendant Conte's motion to dismiss is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of $1,888,241.41 plus interest at the contractual rate of 4% per year from January 1, 2024 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 the plaintiff shall make a motion for such fees on or before January 29, 2026.

1/13/2026
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE