

<b>Regency Control, Inc. v 1239 Broadway Yogurt Corp.</b>
2007 NY Slip Op 34033(U)
December 5, 2007
Supreme Court, Nassau County
Docket Number: 7309-06/
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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REGENCY CONTROL, INC.,

Plaintiff,

-against-

1239 BROADWAY YOGURT CORP. d/b/a  
RAINBOW YOGURT, MARTINA DADIC  
and ANTONELLA VILLA,

Defendants.

RICHARD MARTIN,

Third-party Defendant.

TRIAL/IAS, PART 6  
NASSAU COUNTY

INDEX No. 017309/06

MOTION DATE: Oct. 12, 2007

Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation ..... X
- Memorandum of Law..... X

This motion, by plaintiff, for an order pursuant to CPLR §3212 granting plaintiff and "Third-party defendant" Richard Wender ("Wender") (incorrectly sued herein as Richard Martin), summary judgment pursuant to CPLR §3212 against defendants, 1239

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Broadway Yogurt Corp. d/b/a Rainbow Yogurt, Martina Dadic and Antonella Villa, dismissing defendants' counterclaims against plaintiff and Wender, and granting plaintiff judgment against defendants 1239 Broadway Yogurt Corp. d/b/a Rainbow Yogurt, Martina Dadic and Antonella Villa in the amount of \$86,174.79 plus reasonable legal fees and cost and disbursements on the grounds that no material issues of fact exist to warrant a plenary trial, and for such other and further relief as this Court may deem just and proper, is determined as hereinafter set forth.

### FACTS

The case at bar involves a landlord-tenant dispute. The plaintiff, Regency Control, Inc. ("Regency") is the owner and landlord of 1231 Broadway, Store #6, Hewlett, New York. The defendants are Rainbow Yogurt ("Rainbow"), the tenant of the premises, and Martina Dadic ("Dadic") and Antonella Villa ("Villa"), officers of Rainbow. Rainbow took over the lease as an assignment with assumption on July 8, 1988. The parties modified the lease on December 21, 2001. The relevant provisions are as follows:

the lease is to terminate on January 31, 2007;  
provided that the tenant is not in default of any term or provision of the lease, landlord will apply a once per month credit ("Winter Credits") of \$400.00 toward the base rent payment for the months of December, January, February, and March for each calendar year; if tenant desires early termination of the lease it must a) not be in default of any of the terms in the lease, b) give written notice by certified mail-return receipt indicating desire to terminate lease on a specific date no sooner than 365 days from date of the written notice, and c) accompany written notice with certified check in amount of \$1,700.00; In the event tenant is evicted from the premises, it must return to landlord the sum total of the credits applied; provided that the tenant is not in default of any of the terms of the lease, the landlord will not unreasonably withhold his

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consent to an assignment of this lease; Dadic and Villa guarantee the performance of all terms of the lease and modification agreement.

In a letter dated March 25, 2005, Rainbow notified Regency that its business was up for sale and that it was planning to close following that summer. Regency responded in a letter dated March 31, 2005 stating that the previous letter did not modify Rainbow's responsibilities and the lease was to be terminated on January 31, 2007. In November of 2005, Regency agreed to discuss a possible lease assignment with Rainbow's prospective purchaser ("purchaser"). Discussions ultimately failed when Regency refused to grant the purchaser's request for an extension of the lease.

In March of 2006, Regency served upon Rainbow a Notice to Cure/Demand for Rent due upon Rainbow's failure to pay rent for March. Rainbow vacated the premises on March 31, 2006. The premises remained vacant through January 31, 2007.

### **PROCEDURAL FACTS**

Regency filed summons and complaint on October 4, 2007. In its Answer, the defendants stated counter claims and sought judgment against Regency and Richard Martin as "fourth party" defendant.

### **PLAINTIFF'S CONTENTIONS**

Regency argues it is entitled to summary judgment as a matter of law against the Defendants and is entitled to the damages; that it is entitled to all rent arrears due from March 2006 through January 2007 because Regency was unable to rent the Premises prior to the termination date of January 31, 2007. Regency contends that it is also entitled to the winter credits and deferral payments due to Rainbow's eviction, evidenced by Regency's service of Notice to Cure/Demand for Rent, and that under the terms of the lease, Rainbow must return to Regency the sum total of the credits applied in the event the Tenant is evicted from the premises.

Regency also argues that it is entitled to judgment against the Guarantors for all amounts due and owing from Rainbow, because the Guaranty holds Dadic and Villa liable for default of the lease.

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Moreover, plaintiff argues Richard Wender is entitled to dismissal of the counterclaims based upon lack of jurisdiction and failure to state a viable cause of action. Defendants did not service a Summons upon Wender nor was there a Summons filed with the Court to add Wender to this action, and all of the counterclaims against Wender must be dismissed because he is president of Regency, and as a corporate officer he is not liable for damages arising from their business relationship.

Furthermore, counsel argues that defendants' counterclaims fail, as a matter of law, due to defendants' erroneous assertion that the lease terminated on March 31, 2007 and that Regency unreasonably withheld its consent to the proposed assignment. These claims are contradicted by documentary evidence and terms of the lease.

Counsel further contends that the counterclaims for unpaid School and Town Tax, and security deposit must be dismissed because Rainbow was obligated to pay those sums under the lease until termination. The lease did not terminate earlier because Rainbow failed to comply with the termination procedure in the modification agreement. Moreover, the counterclaims based on Regency's unreasonable withholding of consent to the assignment request from Rainbow must be dismissed, because Regency argues that Rainbow never requested an assignment, only asked Regency to discuss an assignment and possible extension of lease with purchaser. Since the purchaser was seeking an extension of the lease rather than an assignment of the working lease, Regency had no obligation to consent. Even were the Court to find that the request to speak to the purchaser was a request for an assignment, Regency has a right to withhold consent since Rainbow at the time was in default under the lease, and the lease clearly states that Regency would consider a requested assignment unless the tenant was in default.

**DEFENDANTS' OPPOSITION TO MOTION**

The defendants argue that Richard Martin should not be granted summary judgment because he did not represent himself as an officer of Regents, but as the owner of the company, and they are not aware of a Richard Wedner.

The defendants assert that, because Martin had knowledge that the Defendants had to sell the business for personal reasons, Martin would accommodate them and terminate the lease at a date earlier than January 31, 2007. They aver that they were under this impression because they relied on Martin's previous accommodations throughout the landlord/tenant relationship, and they believed that he would accommodate them in this situation as well.

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Furthermore, defendants argue that Martin unreasonably denied consent to the assignment of the lease to the prospective purchaser, because Martin refused to agree on reasonable and objective reasons to finalize the terms of a lease, no matter how flexible the purchaser was. Moreover, they assert that Martin failed to mitigate damages once the Defendants had vacated the premises. Martin placed a sign in the window and did not list the store with a reasonable number of real estate brokers.

### **PLAINTIFF'S REPLY**

The plaintiff asserts that it is entitled to the amount in damages it originally requested, that the counterclaim against Wender should be dismissed, and that the defendants have failed to raise any triable issue of fact.

Plaintiff's counsel argues that the defendants have not offered any evidence to prove that they properly terminated the lease prior to the expiration date, only that they notified the landlord they would vacate the premises. Moreover, they do not deny that the plaintiff is entitled to the deferred payments and credits, nor do they contest the method of calculation of the alleged damages. Thus, the silence must be deemed an admission.

The counterclaim against Mr. Wender must be dismissed because he is a corporate officer and he is not bound personally to the transactions between the parties. The lease and letters are evidence that Regency Control Inc. was the executor of all documents, and the defendants fail to offer any proof that Mr. Wender acted or signed the documents in an individual capacity.

Finally, the defendants have failed to raise any triable issue of fact, the plaintiff had no obligation to negotiate a new lease with the purchaser, and there is no evidence of a written request for an assignment of the lease, only a request that the landlord meet with the purchaser. The landlord discussed an extension of the lease and a possible new lease, but never an assignment of the then present working lease. Moreover, Regency was under no obligation to re-let the premises, and therefore it is irrelevant if it had failed to mitigate the damages.

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**DECISION**

Initially, it is incumbent upon this Court to note, and rule, that the defendant 1239 Broadway Yogurt Corp. is in default on the motion. Pursuant to CPLR 321(a), a corporation “. . . shall appear by attorney. . .”. (Alexander, Practice Commentary, McKinney’s Cons Law of NY, Book 7B, CPLR §321, p.318; **World on Columbus, Inc. v L.C.K. Restaurant Group, Inc.**, 260 AD2d 323, 689 NYS2d 64,65, 1<sup>st</sup> Dept., 1999).

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York, supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

In applying the above legal principles to the facts of the case at bar, the Court has thoroughly examined the entire record, as presented, within the context of the applicable case law and statutory law. Even construing the evidence in the light most favorable to defendants (**Museums at Stony Brook v Village of Patchogue Fire Department**, 146 AD2d 572, 536 NYS2d 177, Second Dept., 1989; see also, **Creighton v Milbauer**, 191 AD2d 162, First Dept., 1993), summary judgment herein is warranted.

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According to the lease, the expiration date is January 31, 2007. There is no documentary evidence of a lease modification, so the lease termination date of January 31, 2007 remains undisturbed.

With respect to the defendants' argument that Regency unreasonably withheld consent to an assignment of the lease, it is unconvincing. The sole evidence is that Regency agreed to negotiate an extension of the lease with the prospective purchaser. The defendants have not offered any evidence demonstrating that Regency had withheld consent to an assignment of the existing lease. There is no proof of any assignment of the lease, and the negotiations described by the defendants/guarantors do not present any issue of fact.

The facts indicate a failure of the meeting of the minds, and not an unreasonable withholding of consent to assign a lease. Moreover, Regency was entitled to reasonably withhold consent because the tenant's rent was in arrears. **Forty Four Eighteen Joint Venture v. Rare Medium, Inc.**, 18 A.D.3d 237, 238 (1<sup>st</sup> Dept 2005); **Leeirv Corp. v. S & E Realty Co.**, 178 A.D.2d 403, 577 N.Y.S.2d 106 (2nd Dept 1991).

Controlling case law holds that Regency did not have a duty to mitigate once Rainbow had vacated the premises. **Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.** (87 N.Y.2d 130, 637 N.Y.S.2d 964, 1995) sets forth that rule:

“Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages (2 Rasch, New York Landlord and Tenant §26:22 [3d ed 1988]).

Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing

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and collect the full rent due under the lease (see, Becar, 64 NY 518, supra; Underhill v Collins, 132 NY 269, supra; Matter of Hevenor, 144 NY 271”.

The defendants claim that a person known only as “Richard Martin” is somehow liable to them, and is described as a “Fourth Party Defendant.” Such claim is **dismissed**. A third party action can only be brought by virtue of service of third party summons and complaint against a 3<sup>rd</sup> person: “a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant, by filing pursuant to a section three hundred four of this chapter a third-party summons and complaint with the clerk of the court” (CPLR 1007). Accordingly, this Court will only treat this action as one between the plaintiff as landlord and the defendants as a corporate entity and as individual guarantors. Moreover, corporate officers may not be held personally liable on contracts of their corporations Westminster Const. Co., Inc. v. Sherman, 160 A.D.2d 867, 554 N.Y.S.2d 300 (2nd Dept 1990). Thus, any purported claim against Mr. Wender is **dismissed**.

Finally, Regency has provided sufficient documentary evidence regarding the damages it seeks, and the defendants have not sufficiently rebutted any calculation or methodology. (Mascoli v. Mascoli, 129 A.D.2d 778, 514 N.Y.S.2d 521, 2<sup>nd</sup> Dept., 1987).

The plaintiff has demonstrated its **prima facie** entitlement to judgment, and the defendants/guarantors have not demonstrated proof to create an issue of fact.

Accordingly, motion for summary judgment for the plaintiff is **granted**; all cross claims against the plaintiff are **dismissed**; judgment is entered against all defendants in the amount of \$86,174.79.

The plaintiff’s counsel may obtain a Clerk’s Judgment for \$86,174.79 plus interest from January 31, 2007. Any claim for attorney’s fees and expenses must await a hearing.

This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of attorney’s fees and expenses to be held on January 24, 2008 at 9:30 a.m.. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall

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serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated DEC 5 2007

Stephen A. Bircan  
J.S.C.

**ENTERED**

**DEC 10 2007**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**