

Wychwood Assoc. v Kimberley Rest. Corp.
2009 NY Slip Op 31879(U)
August 3, 2009
Supreme Court, Nassau County
Docket Number: 020856/08
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

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

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
WYCHWOOD ASSOCIATES.,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.:020856/08

**MOTION DATE:3-19-09
SUBMIT DATE:7-10-09
SEQ. NUMBER - 001**

**KIMBERLEY RESTAURANT CORP., JINN
SOO KIM, MAGIC COOK, INC., and YI QING
TAO,**

Defendant.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 2-27-09.....1**
- Affirmation in Support, dated 3-17-09.....2**
- Affirmation in Opposition, dated 4-14-09.....3**
- Affirmation in Reply, dated 7-7-09.....4**
- Affirmation in Reply, dated 7-7-09.....5**

This motion by the plaintiff for summary judgment on its complaint against defendants Magic Cook, Inc. and Yi Qing Tao, and for a default judgment against Kimberly Restaurant Corp. and Jinn Soo Kim is granted in its entirety. Upon a search of the record, all counterclaims asserted by defendants Magic Cook and Yi Qing Tao are dismissed. Let judgment be entered against these defendants, jointly and severally, in an amount to be determined upon an inquest in accord with the terms of this order.

This is an action for damages under a commercial lease for premises located at 20 South Station Plaza in Great Neck, New York. The original tenant was defendant Kimberly Restaurant Corp. (“Kimberly”), whose performance under its May, 2000 lease with plaintiff landlord Wychwood Associates was guaranteed by defendant Jinn Soo Kim. In June of 2004 Kimberly assigned the lease to defendant Magic Cook, Inc. (“Magic Cook”), whose performance was guaranteed by defendant Yi Qing Tao.

The plaintiff gave its consent in writing, which consent contained the continuing obligation of Kimberly for the payment of rent. The consent also provided for the obligation of Yi Qing Tao, described as president of Magic Cook, to sign the written guaranty of Magic Cook’s obligations under the lease. Magic Cook took the assignment, took possession of the premises and became the tenant.

In August of 2007 Magic Cook defaulted on its payment of rent and additional rent. The plaintiff commenced a summary non-payment proceeding against this defendant. Magic Cook defaulted in appearing, and in October of 2007 the plaintiff was granted possession and a warrant of eviction, with a money judgment in the amount of \$11,569.48. Prior to execution of the warrant, however, Magic Cook moved to vacate the judgment and the warrant, and the parties to the District Court proceeding thereafter entered into a stipulation of settlement dated April 15, 2008, under which the tenant acknowledged that the settlement sum to be paid to the landlord was \$112,609. Half was to be paid by the end of the month of April, and the balance over three months commencing in May. In the event of a default, and expiration of a cure period, the landlord was entitled to execute on a warrant of eviction. All the terms of the lease, “except as amended” by the stipulation, were ratified and affirmed.

Magic Cook failed to make the June, 2008 payment, did not cure its default, and upon application by the landlord the District Court re-issued a warrant of eviction, which was executed by the Nassau County Sheriff in October, 2008.

The present action was commenced in or about November, 2008. It alleges a default under the lease and stipulation and seeks rent and additional rent against all defendants, including the guarantors, and its costs and attorneys' fees incurred as a result of the defaults.

Kimberly and Kim did not answer the complaint. Magic Cook and Yi Qing Tao, at the time represented by one attorney, did so by way of answer dated December 30, 2008. They raised affirmative defenses and counterclaims. The seven affirmative defenses were: lack of personal jurisdiction; lack of subject matter jurisdiction; failure to state a cause of action; failure of the plaintiff to act in good faith; that the damages claimed were caused by the plaintiff's "own negligence, bad faith, and/or culpable conduct, including contributory negligence, assumption of risk"; failure to mitigate damages; and that the plaintiff's claims are barred by the equitable doctrine of unclean hands.

The first counterclaim alleges that plaintiff denied the defendants' offer to continue the lease, and refused to mitigate damages, and because of this denial of defendants' "right to redemption" they suffered damages of no less than \$1 million. The second alleges breach of the lease and lack of cooperation and that as a result these defendants were unable to open for business at the premises, spending over \$1 million in renovation and rental and additional rental payments. The third counterclaim alleges that defendants are ready, willing and able to continue the lease, but have lost the use of the premises because the plaintiff rejected their offer to continue the lease. The defendants allege that the premises are unique, that they

have invested over \$1 million and ask that they be granted injunctive relief restoring them to such premises.

The Court notes that Yi Qing Tao has annexed to her opposition papers a purported Amended Answer, but as there is no cross motion to serve this paper and no indication of a stipulation of all counsel to accept it, the Court must treat it as a nullity and of no force or effect. *See*, CPLR 3025(b). It also finds that given the absence of notice to movant regarding the change of attorneys prior to the making of this motion, there is no defect in the moving papers with which the movant may be charged.

The Court finds that the plaintiff has established its *prima facie* case entitling them to judgment as a matter of law as against Magic Cook and Yi Qing Tao. The obligations under the lease and the stipulation and defendants' default thereunder have been proved by way of documentary evidence and the affidavit of Paul Schroeder, a principal of plaintiff, thereby shifting the burden to these defendants to come forward with admissible proof that issues of fact exist meriting a trial. *See, e.g., Zuckerman v City of New York*, 49 NY2d 557 (1980).

In response, the defendants do not deny the lease, the stipulation, or the circumstances under which the instant case arose. Rather, Magic Cook, by its president Tak Cheung Fok, recites that after the lease assignment it undertook extensive renovations to change the existing sushi restaurant to a hibachi restaurant, spending over \$1 million to purchase the business and to make renovations. However, when the local Fire Department demanded that a chimney be erected plaintiff refused and demanded that Magic Cook seek "unreasonable

alternatives which would have cost over \$30,000 and caused complaints from upstairs tenants.” He claims that the restaurant was unable to open because of plaintiff’s refusal to cooperate with the Fire Department. He also claims that after the settlement in the District Court Magic Cook attempted to resolve the matter by reinstating the lease and allowing the restaurant to open, but was rebuffed. Finally, Magic Cook contends that Yi Qing Tao is not a principal of the corporation but only a guarantor, and as a result service on her did not effect service on Magic Cook, and thus no personal jurisdiction over the corporation was acquired. Yi Qing Tao herself contends that she never signed the stipulation, and thus is not bound as a guarantor thereunder.

None of the foregoing is sufficient. The policy of our courts is to enforce stipulations as written. *Hallock v State of New York*, 64 NY2d 224 (1984); *Ameropan Realty Corp. v Rangely Lakes Corp.*, 282 AD2d 414 (2d Dept. 2001). Further, there is no substantive allegation, let alone proof, that there was concealment of any material fact, overreaching, duress or any other wrongful conduct by the plaintiff that would permit the guarantors to avoid the effect of their signatures on the lease/guarantees. *See generally, Sitar v Sitar*, 61 AD3d 739 (2d Dept. 2009); *Madey v Carman* 51 AD3d 985 (2d Dept.2008).

What occurred prior to the execution of the stipulation is no longer relevant, either as a matter of law or equity, because the parties voluntarily chose to resolve the dispute by way of the April 15, 2008 agreement. If Magic Cook and Yi Qing Tao wished to raise these issues and litigate them, the time to do so was when they were before the District Court. Magic Cook’s alleged loss of the improvements it made to the premises cannot alter the

result, as this is simply the consequence of its default under the stipulation. *Hotel Cameron, Inc. v Purcell*, 35 AD3d 153 (1st Dept. 2006); *1029 Sixth, LLC v Riniv Corp.*, 9AD3d 142 (1st Dept. 2004). In addition, as the plaintiff was under no obligation to accept Magic Cook's offer to reinstate the lease after the stipulation was made, the latter cannot rely on plaintiff's refusal as a defense to this motion.

Under the stipulation the lease was ratified and reaffirmed by the parties, and contract damages for breach of the lease therefore remained available to the plaintiff, including rent to the end of the term and attorneys' fees. The plaintiff could receive possession and back rent owed from the District Court, but not damages to the end of the lease term given the limitation on that Court's jurisdiction, and thus could come to the Supreme Court, which has the requisite jurisdiction to hear this matter. *See, Ross v Realty v V & A Fabricators, Inc.*, 42 AD3d 246 (2d Dept. 2007).

Yi Qing Tao's assertion that she never signed the stipulation is likewise insufficient, as such a bald denial, without more, cannot serve to defeat the motion as to her. *Banco Popular N.Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 (2004). Moreover, the undisputed signature on the guarantee of the lease itself does not vary in any significant way from the one that appears on the stipulation such that an issue of fact is raised, especially as this defendant has not submitted a handwriting expert's evaluation. *Acme Am. Repairs, Inc. v Uretsky*, 39 AD3d 675 (2d Dept. 2007); *Spilky v Bernard H. LaLone Jr., P.C.*, 227 AD2d 741 (3d Dept. 1996). In any event, inasmuch as Yi Qing Tao remains bound as a guarantor under the lease the result would not change even if she had not signed the stipulation.

Finally, Magic Cook's contention that it was not properly served with the summons

and complaint has been waived, as no motion to dismiss based on this claim was timely made. CPLR 3211(e). In any event, its claim that Yi Qing Tao was not an officer and therefore could not accept service on its behalf (CPLR 311[a]) is belied by her signature on the consent to assignment, in which she is described as president of assignee Magic Cook.

Given the foregoing, none of the affirmative defenses or counterclaims raised have merit and all must be stricken. The only one that bears further comment is the claim that the plaintiff failed to mitigate its damages, but the law in New York is that in the commercial setting no such duty exists, especially where, as here, the lease at issue states at paragraph 18 that “The failure of Owner to re-let the premises of an part or parts thereof shall not release or affect Tenant’s liability for damages.” *See, Holy Properties Ltd. v Kenneth Cole Productions, Inc.*, 87 NY2d 130 (1995).

As defendants Kimberley Restaurant Corp. and Jinn Soo Kim have not responded to this motion for a default against them, such relief is granted. Damages shall be assessed at the inquest directed herein. CPLR 3215.

An inquest is required to assess damages, which under the lease and stipulation would be calculated pursuant to paragraph 18, and for attorneys’ fees under paragraph 19. The Court notes that plaintiff advises that the premises have been relet, which of course should be considered in calculating the amounts due under the lease. Attorneys’ fees should not be granted prior to the District Court’s judgment of possession on October 15, 2007, unless they were specifically sought by the plaintiff in the summary proceeding. *Landmark Props. v Olivo*, 62 AD3d 959 (2d Dept. 2009). Such a determination cannot be made on these papers.

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter is referred to the Calendar Control Part (CCP) for an inquest on **September 14, 2009**, at 9:30 A.M.


A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or to appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to an inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 3, 2009

ENTERED 
HON. DANIEL PALMIERI
Acting Supreme Court Justice

AUG 06 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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