

**32 W. 22nd St., LLC v Oolie**

2010 NY Slip Op 30944(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 117112/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
Justice

PART 10

Index Number : 117112/2008  
32 WEST 22ND STREET, LLC  
VS.  
OOLIE, TARA J.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

NOTICE OF MOTION/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

and prelim conf  
scheduled for 5/27/2010

FILED

APR 21 2010

NEW YORK  
COUNTY CLERK'S OFFICE

@ 9:30 am

Dated: APR 15 2010

HON. JUDITH J. GISCHE S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

Supreme Court of the State of New York  
County of New York: IAS 10

-----X  
32 West 22<sup>nd</sup> Street, LLC.,

Petitioner,

Decision/Order

-against-

Index # 117112/08  
Mot. Seq. # 001

Tara J. Oolie, Christine Cortese,  
Just Calm Down, LLC and Just  
Calm Down II, Inc.,

Defendants.

-----X  
Hon. Judith J. Gische, Present:

Pursuant to CPLR 2219(a) the following numbered papers were considered on  
this motion for summary judgment:

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APR 21 2010  
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COUNTY CLERK'S OFFICE

<b>PAPERS</b>	<b>NUMBERED</b>
Notice of Motion, GA affd., exhibits.....	1
TJO affd in Opp., exhibits.....	2
SCS reply affirm., exhibits.....	3

*Upon the foregoing papers the decision and order of the court is as follows:*

Plaintiff moves for summary judgment on the complaint. Defendants oppose the motion in its entirety. Issue has been joined and the Note of Issue has not yet been filed. The motion is, therefore, properly before the court and will be decided on its merits. CPLR § 3212(a); Brill v. City of New York, 2 N.Y.3d 648 (2004).

The complaint sets forth five causes of action respectively for: [1] enforcement of a guaranty against defendants Tara J. Oolie ("Oolie") and Christine Cortese ("Cortese") only; [2] breach of lease, failure to remove a sign; [3] breach of lease, non payment of rent; [4] breach of lease, erecting an illegal sign; and [5] attorneys' fees. Defendants interposed an answer denying the material allegation of the complaint and asserting seven affirmative defenses. Although framed as a motion for summary judgment on

the complaint, the submissions make it clear that plaintiff is not seeking any relief relative to the second and fourth causes of action related to signage.

**Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

Plaintiff claims that defendants owe rent and additional rent in the amount of \$108,057.76 and plaintiff seeks a joint and several money judgment in that amount against all defendants. Plaintiff also seeks attorneys' fees. Plaintiff claims that Just Calm Down LLC ("tenant") entered into a lease for the ground store premises located at 32 West 22<sup>nd</sup> Street in Manhattan ("premises") and that Oolie and Cortese personally guaranteed the obligations of the tenant thereunder. They further claim that after the

tenant defaulted in the payment of rent, a non-payment proceeding was commenced in the Civil Court of the City of New York. Two separate stipulations were entered into with the tenant in connection with the non-payment action which required certain payments. The tenant defaulted on both stipulations, and the tenant was ultimately evicted from the premises on October 3, 2008.

Plaintiff claims that through October 3, 2008 the sum of \$108,057 is owed as "rent and additional rent." It argues that Just Calm Down LLC (the tenant) is responsible for the payment of such rent and that under the guaranty, Oolie and Cortese are responsible for the rent as guarantors. Furthermore, plaintiff argues that Just Calm Down II, Inc. is responsible for the rent as a successor of Just Calm Down, LLC.

In opposition, defendants argue that the lease was with Perlrose Realty Co, LLC, not plaintiff, and that plaintiff has otherwise failed to prove its entitlement to the rent under the lease. They argue that the rent calculated to be due is mathematically at odds with the two court stipulations, which calculate the rent due at particular times in the landlord-tenant relationship. They also argue that the guaranty is limited only to a fixed rent obligation and that plaintiff has failed to identify what if any part of the rent it seeks is fixed and which is additional rent. Finally, they argue that plaintiff has failed to show that Just Calm Down II, Inc. is legally responsible to pay any debt that may be owed by the tenant under the lease.

In reply, plaintiff provides a deed and assignment of leases from Perlrose Realty Co. LLC. It claims that once the tenant defaulted on the stipulations it no longer had the right to the reduced rent calculations set out in the stipulations. It also claims that

because Just Calm Down LLC and Just Calm Down II, Inc. have some of the same principals, and clients, there is sufficient evidence of a "de facto merger of Just Calm Down, LLC into Just Calm Down II, Inc. Finally it argues that even if the calculation of the rent owed cannot be ascertained on this motion for summary judgment, it should at least have summary judgment on the issue of liability.

For at least the reasons that follow, the motion for summary judgment is denied.

Plaintiff has not raised sufficient evidence for the court to conclude, as a matter of law, that Just Calm Down II, Inc. should be answerable for the rental obligation of Just Calm Down, LLC. Assuming without deciding that the concept of de facto merger applies outside of tort, it still requires a showing of four elements, which have not been shown here. In re: New York City Asbestos Litigation, 15 AD3d 254 (1<sup>st</sup> dept. 2005).

The first stipulation between the plaintiff and the tenant stated that the parties agreed that through April 30, 2007 the amount of \$75,000 was owed a "rent and additional rent." There is no indication that this was a bargained for consideration that was forfeited if the tenant defaulted under the stipulation. This agreed to reconciliation of arrears does not reconcile with plaintiffs's claim of the rent due through October 3, 2008. There is a security deposit that has not been accounted for. Consequently, there are seriously disputed issues about what rent is actually owed.

The guaranty made by Oolie and Cortese was expressly limited to "Fixed Rent." Plaintiff seeks a blunderbuss payment of rent and additional rent, and there is no basis to separate what if any rent is fixed rent.

The court otherwise declines to find liability and order a trial only on damages. In this case the amount of rent owed is integral to whether there is a breach of the lease

or the guaranty that they cannot be teased apart.

**Conclusion**

In accordance herewith it is hereby:

ORDERED that the motion for summary judgment is denied, and it is further

ORDERED the parties are directed to appear before the Court for a preliminary conference on **May 27, 2010 at 9:30 a.m.** No further notices will be sent.

Any requested relief not otherwise addresses herein is denied. This constitutes the decision and order of the Court.

Dated: New York, NY  
April 16, 2010

SO ORDERED:

\_\_\_\_\_  
J.G. J.S.C. 

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