

**Jazz On 129th LLC v Christ Temple of the Apostolic
Faith, Inc.**

2012 NY Slip Op 30746(U)

March 22, 2012

Sup Ct, New York County

Docket Number: 106762/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
JAZZ ON 129th LLC,

Plaintiff,

Index No. 106762/10

-against-

DECISION/ORDER

CHRIST TEMPLE OF THE APOSTOLIC FAITH, INC.,

Defendant.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1000).

-----X
CHRIST TEMPLE OF THE APOSTOLIC FAITH, INC.,

Third-Party Plaintiff,

-against-

MOSHE ZIV,

Third-Party Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2</u>
Notice of Cross Motion and Answering Affidavits.....	<u>3</u>
Affirmations in Opposition to the Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>

Plaintiff Jazz on 129th LLC ("Jazz") commenced the instant action against Defendant and

Third-Party Plaintiff Christ Temple of the Apostolic Faith, Inc. (the "Church") to recover damages for conversion of its property, wrongful eviction and replevin stemming from a lease entered into between the parties. Jazz and Third-Party Defendant Moshe Ziv now move for an order (i) pursuant to CPLR § 3212 granting Jazz and Mr. Ziv summary judgment dismissing the Church's counterclaims against Jazz as well as the Third-Party Complaint against Mr. Ziv; (ii) pursuant to CPLR § 3215(a) directing that a default judgment be entered against the Church and in favor of Mr. Ziv, or in the alternative, setting this matter down for an inquest in favor of Mr. Ziv, assessing damages in a sum certain or for a sum certain which can, by computation, be made certain; and (iii) awarding costs and attorneys' fees to Jazz and Mr. Ziv. The Church cross-moves for an order dismissing plaintiff's motion for summary judgment, granting summary judgment in favor of the Church and extending the time for the Church to Answer Mr. Ziv's counterclaims. For the reasons set forth below, Jazz's motion for summary judgment dismissing the Church's counterclaims is granted in part and denied in part, Mr. Ziv's motion for summary judgment dismissing the Third-Party Complaint is denied, Mr. Ziv's motion for a default judgment against the Church is denied, Jazz and Mr. Ziv's motion for an order awarding costs and attorneys' fees is denied, the Church's cross-motion for summary judgment against Jazz is granted in part and denied in part, the Church's cross-motion for summary judgment against Mr. Ziv is denied and the Church's cross-motion for an order extending the time for the Church to answer Mr. Ziv's counterclaims is granted.

The relevant facts are as follows. On or about May 25, 2006, Jazz entered into a lease agreement (the "Lease") with the Church whereby Jazz was to rent the premises located at 12 West 129th Street, New York, New York (the "premises") for operation of a youth hostel and for the maintenance of an administrative office for said hostel. Mr. Ziv signed the lease with a personal guarantee. Thereafter, Jazz opened for business a youth hostel under the terms of the Lease.

On or about November 3, 2009, the Mayor's Office of Special Enforcement ("OSE") received a complaint that the premises was being run contrary to the Certificate of Occupancy for the building. OSE inspected the premises and issued a full vacate order for the premises citing illegal occupancy in a residential zoning district. The OSE issued the order to vacate pursuant to Admin. Code of the City of New York § 28-207.4.2 as it found that

[T]here is imminent danger to life or public safety or safety of the occupants or to property, in that combustible wood framed Transient Hotel, exist with over 100 sleeping Units with 'no 2nd Means of Egress.'

As evidenced by the New York City Zoning Map 6a, the premises is located within an R7-2 zoning district. This is a general residential district in which the only uses permitted are residential and community facility uses. Commercial uses, such as youth hostels, are prohibited in an R7-2 zoning district.

Jazz attempted to challenge the vacate order. However, it became apparent that the use of the premises for a youth hostel and administrative office was not and would not be permitted. The OSE vacate order remains in effect at this time.

In January 2010, Jazz stopped paying rent to the Church, abandoned the premises pursuant to the vacate order and terminated utilities to the premises. The Church alleges that this led to severe flooding which rendered the premises uninhabitable.

On May 21, 2010, Jazz filed the underlying Summons and Complaint and motion, brought by Order to Show Cause, for, among other things, permission to enter the premises to retrieve its furniture, office equipment, personnel records, business records and other personal property used in the operation of the youth hostel. On or about May 31, 2010, the Church filed a Verified Answer with counterclaims. On or about June 4, 2010, Jazz filed a Verified Answer to the

counterclaims asserted by the Church. On June 7, 2010, the court granted Jazz's motion for the above relief.

On or about December 1, 2010, the Church filed a Third Party Complaint against Mr. Ziv alleging that Mr. Ziv is liable because he personally guaranteed the Lease when he signed pursuant to the "Good Guy Guarantee" in Paragraph 22 of the Lease's Rider. A motion for a default judgment was filed against Mr. Ziv for his failure to answer the Church's Third-Party Complaint. Mr. Ziv, however, contends that service was never made. However, in an effort to avoid unnecessary motion practice and the time and money associated with a hearing, Mr. Ziv suggested that the Church withdraw its motion for a default judgment and extend Mr. Ziv's time to answer until March 4, 2011. A stipulation was entered into memorializing this agreement. On March 3, 2011, Mr. Ziv filed his answer and on March 23, 2011, he filed an Amended Answer with counterclaims.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, Jazz is not entitled to summary judgment dismissing the Church's first counterclaim. The Church, however, is entitled to summary judgment on its first counterclaim. The Church's first counterclaim seeks to recover \$9,600.00 that the Church, as owner of the premises, was caused to pay due to violations as a result of plaintiff's failure to obtain proper

permits or certificates to use the premises as a youth hostel. Paragraph 37 of the Lease states:

Lessee shall use and occupy the premises for the purpose of:

Operating a Youth Hostel and an administrative office to support Hostel.

Lessee shall have the right at its own expense to contest, by appropriate proceedings diligently conducted in good faith, any allegation by public authorities that Lessee, the Premises or any Improvements are in violation of any Requirements or any certificate of occupancy affecting the Premises, but only so long as:

(a) Neither the Premises nor any part thereof would by reason of such contest be, in Lessor's sole judgment, in danger of being forfeited or lost;

(b) Lessor shall not in its sole judgment be in danger of being subject to criminal liability or penalty by reason of such contest; and

(c) Lessee shall have indemnified and shall continue to indemnify Lessor with a surety bond, or other means satisfactory to Lessor in its sole discretion, in an amount sufficient to pay any fines, penalties or other charges that may or might be assessed against or become a charge on the Premises if such contest is unsuccessful...If Lessee upon the conclusion of any contests or proceedings shall fail to pay any fines, penalties or other charges thereby determined to be due, or if prior thereto Lessor, in the exercise of its sole judgment, shall determine that either condition (a) or (b) of this Section is no longer satisfied, Lessor may apply all or any part of any security provided under this Section to the payment, removal and discharge of such amounts and any costs, expenses (including, but not limited to, Lessor's attorneys' fees) and other liabilities accruing in such proceedings, and shall refund to Lessee the balance of any security not so applied, if any. Lessee shall promptly pay to Lessor any deficiency resulting from such application, with the amount of such deficiency to be due as Additional Rent due on the next rent day after any such deficiency is determined, with interest thereon at the rate of Prime plus three percent (3%) per annum from the date of such determination.

Subsequent to the issuance of the vacate order, Jazz unsuccessfully contested the OSE's allegations that the premises was being used in violation of the building's Certificate of

Occupancy. Thus, part (c) of Paragraph 37 of the Lease comes into effect which requires that Jazz indemnify the Church in an amount sufficient to pay any fines, penalties or other charges that may be assessed against the premises. As the Church was fined \$9,600.00 due to Jazz's use of the premises in violation of the Certificate of Occupancy, Jazz is contractually required to indemnify the Church in that amount.

Jazz's argument that it is not liable to the Church for the \$9,600.00 fine because the Church misrepresented the use of the premises is without merit. There was no express representation made by the Church in the Lease as to whether the premises could be used as a youth hostel pursuant to the Certificate of Occupancy. To the contrary, the parties explicitly stated in the Lease that they recognized that use of the premises as a youth hostel might violate the Certificate of Occupancy and that it would be solely Jazz's obligation to contest any allegation that the use of the premises violated the Certificate of Occupancy. Thus, Jazz's motion for summary judgment dismissing the Church's first counterclaim is denied and the Church's cross-motion for summary judgment as against Jazz on its first counterclaim is granted.

Jazz is, however, entitled to summary judgment dismissing the Church's second counterclaim and the Church is not entitled to summary judgment against Jazz on its second counterclaim. The Church's second counterclaim seeks to recover \$50,000.00 in damages due to Jazz's allegedly malicious and negligent acts, including Jazz's abandonment of the premises and Jazz's decision to terminate all utilities to the premises upon abandonment. The second counterclaim must be dismissed as the Church has affirmatively stated in response to Jazz's demand for a bill of particular that it is no longer seeking \$50,000.00 in damages from Jazz for its allegedly malicious and negligent acts. Thus, Jazz's motion for summary judgment dismissing the Church's second counterclaim is granted and the Church's cross-motion for summary judgment as

against Jazz on its second counterclaim is denied.

Jazz is not entitled to summary judgment dismissing the Church's third counterclaim which seeks to recover \$198,096.00 in unpaid rent due to Jazz's alleged breach of the Lease when Jazz abandoned the premises in January 2010 and stopped paying rent. The court finds, however, that the Church is entitled to summary judgment on its counterclaim to recover the unpaid rent. Pursuant to the Lease, Jazz is required to pay monthly rent to the Church and Jazz has not presented a defense as to why it does not have to pay rent for the sixteen months still left of the Lease after it abandoned the premises in January 2010.

Jazz's only argument as to why it does not have to pay \$198,096.00 in rent to the Church is that the Lease is void and unenforceable due to its illegal purpose. A lease will not be automatically voided when the tenant's contemplated use of the premises does not conform with the existing certificate of occupancy. See *Progressive Image Gruppe, Inc. v. Charles Street Owners, Inc.*, 272 A.D.2d 66 (1st Dept 2000); see also *56-70 58th Street Holding v. Fedders-Quigan Corp.*, 5 N.Y.2d 557 (1959). In *Progressive*, as in the present case, the lease contained no express representation as to the Certificate of Occupancy and the tenant's use of the premises did not conform to the existing Certificate of Occupancy. The court held that the failure to conform the use of the premises to the Certificate of Occupancy, however, did not give the tenant the right to terminate the lease. *Id.* In the instant case, as in *Progressive*, Jazz is not entitled to terminate the Lease based on the fact that its use of the premises was not permitted by the Certificate of Occupancy. This is particularly true in this case where the parties were aware that the use of the premises as a youth hostel did not conform to the existing Certificate of Occupancy and that Jazz was responsible to contest any allegation made that the premises were in violation of the Certificate of Occupancy. Thus, as the Lease is valid and enforceable, Jazz's motion for summary

judgment dismissing the Church's third counterclaim is denied. The Church's cross-motion for summary judgment on its third counterclaim is therefore granted.

Additionally, Mr. Ziv is not entitled to summary judgment dismissing the Church's Third-Party Complaint and the Church is not entitled to summary judgment against Mr. Ziv. As previously explained, Mr. Ziv signed the Lease as a personal guarantor, and thus, the Church brought Mr. Ziv into this litigation as a Third-Party defendant and necessary party to this action.

Paragraph 22 of the Rider to the Lease states:

"Good Guy Guarantee"

By executing this Lease Moshe Ziv personally guarantees the obligations of Lessee and/or Lessee's representatives, successors and assigns including, without limitation, obligations accruing during that period of time during which Lessee and/or its partners, shareholders, agents, employee(s), assignees, subLessees, licensees or anyone else with the permission of and/or under or through Lessee (notwithstanding the expiration or revocation of any such permission) occupies the Premises or any part thereof, it being understood that the undersigned shall bear no liability for rents pertaining to the periods occurring after the Good Guy Period as a result of a default under the Lease by Lessee.

"'Good Guy' guaranties are commonly understood to apply to obligations which accrue prior to the surrender of the lease premises, and this obligation, once accrued, persists even after surrender of the premises." *Russo v. Heller*, 80 A.D.3d 531, 532 (1st Dept 2011). Moreover, the terms of a guarantee determine its scope and duration. *See id.* However, in reviewing the language of the Lease, it is not clear whether or not the parties intended to hold Mr. Ziv liable for Jazz's default after Jazz surrendered the premises to the Church. Nowhere in the language of Paragraph 22 does it explicitly state that the guarantor would only be liable for obligations which accrued prior to the tenant's surrender of the premises. Since there are disputed issues of fact as to what Mr. Ziv is liable for and the language of Paragraph 22 is ambiguous, both Mr. Ziv's motion for summary

judgment dismissing the Church's Third-Party Complaint and the Church's cross-motion for summary judgment against Mr. Ziv are denied.

Mr. Ziv's motion for an order, pursuant to CPLR § 3215, directing that a default judgment be entered against the Church, is denied and the Church's cross-motion for an order extending its time to answer Mr. Ziv's counterclaims is granted. To oppose a motion for or vacate a default judgment, a defendant must demonstrate a reasonable excuse for the default by submitting an affidavit of someone with personal knowledge of the material facts. *See Matter of Wynyard v. Antique Co. of N.Y.*, 247 A.D.2d 265 (1st Dept 1998); *see also* CPLR § 5015(a)(1). In the instant action, Mr. Ziv's motion for a default judgment against the Church is denied as the Church has provided a reasonable excuse for its default in answering Mr. Ziv's counterclaims. The Church provided an excuse in the affidavit of Carol Thomas, a full time employee of the Church, who is someone with personal knowledge of the material facts. Ms. Thomas' affidavit provides an excuse for the default - that counsel for the Church has been ill and thus unable to answer Mr. Ziv's counterclaims. Therefore, Mr. Ziv's motion for a default judgment against the Church is denied. The Church's cross-motion for an order extending its time to answer Mr. Ziv's counterclaims is therefore granted as it has provided a reasonable excuse for its default. The time for the Church to answer Mr. Ziv's counterclaims is thereby extended to April 20, 2012.

Finally, Jazz and Mr. Ziv's motion for an order awarding them costs and attorneys' fees is denied as they have provided no basis for such relief.

Accordingly, Jazz's motion for summary judgment dismissing the Church's first and third counterclaims is denied, Jazz's motion for summary judgment dismissing the Church's second counterclaim is granted, Mr. Ziv's motion for summary judgment dismissing the Third-Party

Complaint is denied, Mr. Ziv's motion for a default judgment against the Church is denied, Jazz and Mr. Ziv's motion for an order awarding costs and attorneys' fees is denied, the Church's cross-motion for summary judgment against Jazz is granted only as to its first and third counterclaims but denied as to its second counterclaim, the Church's cross-motion for summary judgment against Mr. Ziv is denied and the Church's cross-motion for an order extending the time for the Church to answer Mr. Ziv's counterclaims is granted and extended to April 20, 2012. The Clerk is directed to enter judgment in favor of Jazz dismissing the Church's second counterclaim and in favor of the Church on its first and third counterclaims in the amounts of \$9,600 and \$198,096 plus costs and disbursements. The parties are directed to appear for a compliance conference on this case in Part 55 on April 30, 2012 at 11:00 a.m.

This constitutes the decision, judgment and order of the court.

Dated: 3/22/12

Enter: _____ egk _____

J.S.C.