

**361 E. Realty Assoc. LLC v Sayegh**

2012 NY Slip Op 33327(U)

January 10, 2012

Supreme Court, New York County

Docket Number: 650424/2011E

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

Index Number : 650424/2011 E

**361 EAST REALTY ASSOCIATES LLC**

vs.

**SAYEGH, MILAD**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 650424/11E

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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*

**IS DECIDED IN ACCORDANCE WITH**

**THE ENCLOSED DECISION, ORDER, AND AFFIDAVITS.**

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

*PC 2/29/12 2:15 pm*

Dated: 1/10/2012

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
361 EAST REALTY ASSOCIATES LLC,

Plaintiff,

Index Number 650424/2011E

Mot. Seq. No. 001

-against-

MILAD SAYEGH,

Defendant.

**DECISION AND ORDER**

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**Papers considered in review of this e-filed motion for summary judgment:**

<b>Papers</b>	<b>E-Filed Document Nos.</b>
Notice of Motion, Affidavit, Affirmation, Exhibits	6 (1-3)
Rule 19-a Statement of Material Facts	8
Affidavit in Opposition, Exhibits, Memo of Law	12, 12-1, 13
Reply Affidavit, Exhibits, Affirmation	14 - 15
Transcript of Proceedings on 09/28/2011	17

**PAUL G. FEINMAN, J.:**

Plaintiff moves for an order granting partial summary judgment pursuant to CPLR 3212, as to the first, second, and third causes of action in the complaint and for dismissal of defendant's affirmative defenses, and for leave to amend the caption pursuant to CPLR 3025. Defendant opposes. For the reasons which follow, the motion is granted in part and otherwise denied.

According to the complaint, plaintiff is the owner and landlord of the building known as 361-373 East Fordham Road, Bronx, New York (Doc. 6-3, Mot. ex. A, Complaint ¶ 3). Plaintiff allegedly entered into a lease agreement on June 1, 2009, with D.K.S. Restaurant Corp. doing business as Dickey's Barbeque Pit to rent a portion of the ground floor and mezzanine of the

premises (Doc. 6-3, Mot. ex. A, Complaint ¶ 4, Doc. 6-3 at 68, ex. A, Form of Store Lease).<sup>1</sup> Defendant is president of D.K.S. Restaurant Corp. (See Doc. 6-3 Mot. ex. B, 10/15/2009 Letter Agreement). By terms of a letter agreement dated October 15, 2009, D.K.S. accepted possession of the premises as of October 17, 2009, and the tenancy was to continue until September 30, 2019 (Doc. 6-3, Mot. ex. A, Complaint ¶ 7; Doc 6-3 at 68, ex. B, 10/15/2009 Letter Agreement). Defendant signed a Guaranty of the lease agreement (Doc. 6-3, Mot, ex. A, Complaint ¶¶ 2, 5; Doc. 6-3 at 62 *et seq.*, Guaranty).

According to the complaint, D.K.S. defaulted in its obligations to pay rent and additional rent and also failed to comply with the lease terms by bonding or discharging two Mechanic's Liens filed against the building (Doc. 6-3, Mot. ex. A, Complaint ¶¶ 15-17; Doc. 6-3 at 80-84, Mechanic's Liens). It vacated the premises on about December 23, 2010, in violation of the lease terms (Doc. 6-3, Mot. ex. A, Complaint ¶ 19). According to the January 4, 2011 letter written to plaintiff by the attorney representing D.K.S., the restaurant vacated the space having failed "to withstand the increased losses with no break even point in sight, much less an expectation of profitable operations, primarily based on the decrease in the level of business after competing food establishments moved in nearby." (Doc. 6-3 at 100, Mot. ex. E, 01/04/2011 Letter from Wolfsie to Jemal).

Plaintiff commenced this litigation against defendant Sayegh by e-filing it complaint on February 17, 2011, alleging four causes of action. The first and second allege breach of the lease agreement by the tenant defendant/guarantor, and claim \$61,856.15 owed representing unpaid

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<sup>1</sup>The lease is undated, and signed only by plaintiff, although each page contains two sets of initials, one of them being "MS." The Guaranty is dated June 24, 2009.

rent and additional rent. The third cause of action alleges contractual indemnification for all costs and damages suffered by plaintiff because of the filing of the two mechanic's liens, as well as breach of the lease for failure to bond and/or discharge the mechanic's liens; it seeks a money judgment in the principal amount of the mechanic's liens plus interest, cost, and expenses. The fourth cause of action seeks attorney's fees, costs and disbursements, and interest, as pursuant to the lease agreement and the Guaranty. According to the Affidavit of Service, the summons and complaint were personally served on defendant by delivery to him in person on February 18, 2011 (Doc. 6-3 at 98-99, Mot. ex. D, Aff. of Service).

Issue was joined when defendant served his answer containing eight affirmative defenses and six counterclaims (Doc. 6-3 at 86 *et seq.*, Mot. ex. B, Ver. Answer). The affirmative defenses allege failure to state a cause of action, statute of limitations, breach of Uniform Commercial Code § 2-A-201, the Statute of Frauds, lack of personal jurisdiction, common law fraud, unclean hands, bad faith, and improper venue. Plaintiff thereafter submitted a reply to the counterclaims with affirmative defenses (Doc. 6-3 at 93 *et seq.* Mot. ex. C, Reply to Counterclaims).

#### Partial Summary Judgment

Plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment on the first, second, and third causes of action in the complaint and dismissing defendant's affirmative defenses, as well as for leave to amend the caption pursuant to CPLR 3025. Defendant opposes the motion for summary judgment on the ground that plaintiff fails to establish a *prima facie* entitlement to summary judgment.

To prevail on a summary judgment motion, the moving party must produce evidentiary

proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Issue finding rather than issue determination is the function of the court in determining a motion for summary judgment (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Corvino v Mount Pleasant Centr. Sch. Dist.*, 305 AD2d 364, 364 [2d Dept 2003]; *Bielat v Montrose*, 272 AD2d 251, 251 [1<sup>st</sup> Dept. 2000]). It is not the court's function to assess credibility (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997], citing *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). If the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Where an owner seeks summary judgment upon a written guaranty, it must prove that there exists "an absolute and unconditional guaranty," the underlying debt, and the guarantor's failure to perform under the guaranty (*Kensington House Co. v Oram*, 293 AD2d 304, 305 [1st Dept 2002]). Here, plaintiff's moving papers include a copy of the lease agreement that is undated and unsigned by the tenant, not witnessed, and not acknowledged by the tenant (Doc. 6-3, at 17, Mot. ex. A, Complaint ex. A, Lease). The typed portion of the first page of the lease indicates that the tenant is D.K.S. Restaurant Corp., doing business as Dickey's Barbecue Pit, and that its office address is "c/o Milad Sayegh" (Doc. 6-3 at 10, Mot. ex. A, Complaint ex. A, Lease). Each page of the lease agreement is initialed with two sets of initials, with most pages clearly showing "MS" as one set of initials, but certain pages, particularly 16, 31, 37, 39, and the

four pages of the Guaranty, 62-66, while marked, do not read as "MS." Although defendant's Verified Answer denies making a Guaranty in favor of plaintiff (Doc. 6-3 Mot., ex. B, Ver. Ans. ¶ 3), the undated Guaranty attached as part of the lease agreement, is signed with defendant's name, and it was witnessed on June 24, 2009 (Doc. 6-3 at 62-66, Mot. ex. A Complaint, ex A, Lease Guaranty).

The Statute of Frauds requires that a lease for a period longer than one year must be in writing and subscribed by the party to be charged (General Obligations Law, § 5-703 [2]). Nonetheless, subdivision 4 of section 5-703 states that "[n]othing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance." In equity, a court may direct specific performance of an unsigned lease when there has been partial performance and ratification by the party to be charged (*Carlyle Record Warehouse Corp. v Scherlo*, 94 Misc 2d 226, 228 [Civil Ct, NY County 1978]). Here, the affidavit of plaintiff's member, Alan Jemal, states that the parties entered into a lease agreement which was breached by D.K.S. and defendant (Doc. 6-1, Jemal Aff.). Plaintiff proffers the unsigned copy of the lease between it and D.K.S. Restaurant which shows that the parties contemplated such an agreement, and a letter signed by both parties agreeing that October 17, 2009 would be the commencement day of the leasehold. It shows evidence by the copies of the Mechanic's Liens that between October 18, 2009 and March 5, 2010, labor and materials were provided by contractors, one of whom was employed directly by defendant Sayegh, for work to be performed at 363 East Fordham Road. Further, it establishes that D.K.S. Restaurant Corp. abandoned plaintiff's space at 363 Fordham Road on December 23, 2010, because the restaurant could not make a profit. According to the complaint, plaintiff claims the balance of

unpaid rents due from March 2010 and all charges for the month of December 2010, totaling \$27,474.15, and then for all amounts due thereafter.

Plaintiff establishes a prima facie entitlement to summary judgment, based on the equitable principle of part performance.<sup>2</sup> It shows that D.K.S. occupied plaintiff's premises as a tenant and paid rent, and that it abandoned the premises on December 23, 2010.

Plaintiff having initially established entitlement to summary judgment, the burden shifts to defendant to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Defendant concedes, as he must, that in fact he signed the Guaranty on June 24, 2009, but contends that the Guaranty was not executed concurrently with the lease (Doc. 12, Sayed Aff. ¶ 10). He points to his missing signature, along with the missing witness and acknowledgment to argue that neither the lease nor the Guaranty are valid (Doc. 12, Sayegh Aff. ¶ 10). He also contends that the October 15, 2009 letter confirming that the lease was to commence as of October 17, 2009 was not signed by him and that the signature is a forgery (Doc. 12, Sayegh Aff. ¶¶ 6, 11). He does not, however, account for his admitted presence in plaintiff's premises, why he hired a contractor which hired a subcontractor to begin renovations and repairs on September 7, 2009 (Doc. 12, Sayegh Aff. ¶ 13), or why his attorney notified plaintiff of his vacating the premises because he was unable to make a profit at that location. He does not explain why he delivered a check to plaintiff's offices in the amount of \$44,000, representing \$29,600 as a security deposit and \$14,800 for one month's rent (Doc. 12, Sayegh Aff. ¶ 5). In addition, defendant's affidavit is replete with

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<sup>2</sup>Plaintiff submits another copy of the lease agreement in its reply papers, allegedly signed by defendant but undated and unwitnessed (Doc. 14-1, Reply, ex. A, Lease).

statements explicitly or implicitly showing that his wholly owned corporation, D.K.S. Restaurant Corp., opened a restaurant in plaintiff's space in about April 2010 and that he had worked in the space to make it ready for business in the months before (Doc. 12, Sayed Aff. ¶¶ 2, 13-20). In short, defendant does not raise a question of material fact requiring a trial. Even if there is a question as to when the lease began, the evidence is clear that defendant's corporation occupied the premises as a lawful tenant, and paid rent for about 9 months, in accordance with the terms of the lease agreement, before quitting the premises. His affidavit describes his work to get the space in shape for commercial use, as well as various difficulties, including vermin and ongoing roof leakage, that he encountered while in the premises. One must conclude that his corporation was situated in plaintiff's premises based on the agreement by the parties as set forth in the unsigned lease agreement. Accordingly, plaintiff's motion for summary judgment on the first and second causes of action is granted.

The third cause of action seeks indemnity as to the Mechanic's Liens. By statute, a lien exists for a one year period and is then extinguished unless an action is commenced to foreclose the lien and a notice of pendency is filed, or the lienor seeks permission to extend the lien for another year (Lien Law § 17). Plaintiff has not alleged that there is filed a notice of pendency or a foreclosure action as to either lien. The lien filed by Jenny Services, Inc., claiming \$5,032.85, was filed on March 30, 2010, and thus appears to have expired prior to plaintiff making its motion.<sup>3</sup> The lien filed by JSC General Contractors, Inc., filed on August 2, 2010, also would have expired if the lienor did not seek an extension or to commence proceeding. Defendant

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<sup>3</sup>Defendant proffers a copy of a document allegedly downloaded on July 9, 2011, from the website of the New York State Department of State, indicating that Jenny Services, Inc., was dissolved by proclamation/annulment of authority as of January 26, 2011 (Doc. 12-1 at 29-30, Def. ex. J)

provides a copy of the New York State Department of State downloaded document, showing that no "JSC General Contractors Inc." is listed with the State as of July 8, 2011 (Doc. at 27, Ex. I). If JSC is not a state licensed contractor, it could not seek damages for work undone.

The instant motion papers were submitted after the August 2, 2011, date of extinguishment. Plaintiff's reply papers do not provide anything to show that either lien remains active. Therefore, it appears that the third cause of action has become academic, and plaintiff's motion for summary judgment as to the third cause of action is denied on this basis. Furthermore, the third cause of action is dismissed without prejudice to renewal should either lien be active.

#### Dismissal of the affirmative defenses

Plaintiff seeks dismissal of the eight affirmative defenses on the ground that they are "pure nonsense" (Doc. 6-1, Jemal Aff. ¶ 27). To the extent that it can be found that defendant's motion papers addressed this branch of plaintiff's motion, he did not show support for any of the affirmative defenses. Plaintiff provides an affidavit of service to show that defendant was served with in-hand service, thus disproving the defense of lack of personal jurisdiction, and there is nothing that hints of unclean hands, or bad faith. The defense of common of law fraud is dismissed on the ground that defendant fails to allege the circumstances constituting the fraud in detail, as per CPLR 3016 (d). The other defenses facially lack merit. Accordingly, plaintiff's motion is granted and the affirmative defenses are stricken.

#### Amending the complaint

Pursuant to CPLR 3025(b), "leave to amend the pleadings shall be freely given, absent prejudice or surprise resulting from the delay" (*see McCaskey, Davies & Assoc., Inc., v New York*

*City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). “Prejudice in this context means that the party opposing the amendment has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Garrison v Wm. H. Clark Municipal Equip.*, 239 AD2d 742, 742-743 [3d Dept 1997]). The standard applied on a motion to amend a pleading is “much less exacting” than that applied on a motion seeking summary judgment (*James v R. & G. Hacking Corp.*, 39 AD3d 385, 386 [1<sup>st</sup> Dept. 2007], *lv denied* 9 NY3d 814 [2007]).

Plaintiff attaches a proposed Amended Complaint as exhibit G of its motion papers (Doc. 6-3 at 105 *et seq.*, Mot. ex. G). It seeks to add as damages the amounts owed for rent and additional rent for the months of March through May 2011. The new fourth cause of action seeks damages for unpaid rents for the period of March - May 2011, in the amount of \$47,820.00. The new fifth cause of action alleges waste, specifically that defendant unlawfully removed electric lines and panels, destroyed walls and fixtures, and left behind garbage and food, and seeks not less than \$1 million in damages. The sixth cause of action seeks damages as per the lease agreement’s paragraph 18, not only as to liquidated damages for the rent and unpaid rent due for the balance of the term, but also all costs plaintiff may incur to ready the premises for re-letting; and seeks not less than \$1 million.

Defendant strongly disputes that D.K.S. removed anything from the premises other than what it had purchased and installed, and avers that he left the space broom clean, and in “better condition” than when his company first occupied the premises (Doc. 12, Sayegh Aff. ¶ 26). His allegations are, at this juncture, not sufficient to establish a lack of merit in any of the proposed new causes of action or that he is prejudiced by the amendment at this early stage of the

litigation. Accordingly, this branch of plaintiff's motion is granted. It is

ORDERED that the motion for partial summary judgment is granted to the extent of granting summary judgment in favor of plaintiff and against defendant as follows:

Plaintiff is granted judgment on the first and second causes of action in the amount of \$61,856.15, together with interest as calculated by the Clerk of Court at the statutory rate from the date of commencement of this action, as well as costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the first and second causes of action are severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's motion for summary judgment on the third cause of action is denied as academic and, upon a search of the record, the third cause of action is dismissed without prejudice; and it is further

ORDERED that the branch of plaintiff's motion seeking to dismiss the affirmative defenses is granted in its entirety; and it is further

ORDERED that the branch of plaintiff's motion for leave to amend the complaint is granted to the extent that upon service of a copy of this order, together with notice of its entry the proposed amended complaint annexed as Exhibit G to the moving papers shall be deemed served and filed, but only as to the first and second causes of action, and to the extent of adding the new fourth, fifth, sixth, and seventh causes of action; and it is further

ORDERED that the fourth through seventh causes of action are severed and continued under this index number;

ORDERED that the defendant shall answer the amended complaint's newly added fourth

through seventh causes of action or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference regarding the fourth through seventh causes of action in Part 12, Supreme Court, 60 Centre Street, Room 212, New York, NY 10007 on February 29, 2012, at 2:15 PM.

This constitutes the decision and order of the court.

Dated: January 10, 2012  
New York, New York



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J.S.C.