

**Gallo Nero, Inc. v Bordeliw, Inc.**

2014 NY Slip Op 32461(U)

September 23, 2014

Supreme Court, New York County

Docket Number: 150205/2014

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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GALLO NERO, INC. a/k/a GALLO NERO CORP.,

Plaintiff,

- against -

Index No. 150205/2014  
Motion Date: 6/16/2014  
Motion Seq. No.: 001

BORDELIW, INC., BERTBERN REALTY, INC. a/k/a  
BERTBERN REALTY CORP., NANCY B. MAYER,  
SUSAN M. REEVES, PETER J. MAYER, JOSEPH S.  
ISEMAN, AS CO-TRUSTEES OF A TRUST FOR THE  
BENEFIT OF SUSAN M. REEVES CREATED  
PURSUANT TO ARTICLE TENTH OF THE LAST  
WILL AND TESTAMENT OF MYRON L. MAYER,  
DECEASED, and NANCY B. MAYER, SUSAN M.  
REEVES, PETER J. MAYER, JOSEPH S. ISEMAN, AS  
CO-TRUSTEES OF A TRUST FOR THE BENEFIT OF  
PETER J. MAYER CREATED PURSUANT TO  
ARTICLE TENTH OF THE LAST WILL AND  
TESTAMENT OF MYRON L. MAYER, DECEASED,

Defendants.

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**BRANSTEN, J.**

This commercial landlord-tenant dispute comes before the Court on Plaintiff Gallo Nero, Inc. a/k/a Gallo Nero Corp.'s ("Gallo Nero") motion to consolidate, enter default, and stay a damages inquest. Defendants Bordeliw, Inc., Bertbern Realty, Inc. a/k/a Bertbern Realty Corp. (together with Bordeliw, Inc. "Corporate Defendants"), Nancy B. Mayer, Susan M. Reeves, Peter J. Mayer, and Joseph S. Iseman as co-trustees of a trust for the benefit of Susan M. Reeves ("Reeves Trust"), and Nancy B. Mayer, Susan M. Reeves, Peter J. Mayer, and Joseph S. Iseman as co-trustees of a trust for the benefit of Peter J. Mayer (together with Reeves Trust, "Trust Defendants," collectively with other

Defendants, “Landlord”) oppose and cross-move to dismiss the complaint and enter default judgment on their counterclaims, or alternatively to compel Gallo Nero to accept their answer. Gallo Nero opposes. For the reasons stated on the May 13, 2014 record, Gallo Nero’s motion was denied as to the portion seeking to consolidate and stay and was otherwise withdrawn, while Landlord withdrew the default judgment portion of its motion. For the reasons stated below, the remainder of Landlord’s cross-motion to dismiss or in the alternative for summary judgment is granted in part and denied in part.

#### **I. Background**

This action has its genesis in two prior actions between Gallo Nero, the tenant Italian restaurant, and Landlord regarding of a building located at 185 Bleecker Street in Greenwich Village. In the first action, Gallo Nero sought to exercise an option to extend its lease dated February 15, 2001 (the “Lease”). (Affidavit of Marcello Assante (“Assante Aff.”) Ex. 1.) By order dated April 9, 2013, this Court granted Gallo Nero’s summary judgment motion and extended the Lease termination date from February 28, 2013 until February 28, 2016. (“Renewal Order”).

On March 8, 2013, a fire broke out in Gallo Nero’s kitchen and damaged the property. Shortly thereafter, Landlord commenced the second action seeking to terminate the Lease under Article 9 due to the damage caused by the fire and to enjoin Gallo Nero from making any repairs. Gallo Nero appeared and moved to compel Landlord to complete repairs to allow the restaurant to reopen. This Court denied Gallo Nero’s

motion to compel repairs and enjoined Gallo Nero from completing repairs on its own. By order dated July 26, 2013, this Court granted Landlord's motion for default judgment in the second action due to Gallo Nero's failure to answer the complaint ("Default Order").

In January 2014, Gallo Nero commenced the instant action, alleging (i) breach of contract due to Landlord's failure to respond to the Lease renewal request, (ii) breach of contract due to Landlord's failure to adhere to Article 9(b) of the Lease, (iii) breach of contract due to Landlord's failure to adhere to Article 9(c) of the Lease, (iv) breach of contract and unjust enrichment due to Landlord's failure to return the security deposit, and (v) breach of contract due to Landlord's failure to adhere to Articles 4 and 13 of the Lease. Defendants answered on March 25, 2014, asserting various affirmative defenses and counterclaims for (i) abuse of process and (ii) attorneys' fees.

Gallo Nero moved to consolidate this action with the second action, to stay the related action, and for default judgment against Trust Defendants. Landlord cross-moved to dismiss the complaint or for summary judgment, to enter default on the counterclaims asserted in the answer, and to compel Gallo Nero to accept the answer.

The parties appeared for oral argument on May 13, 2014. On the record, this Court denied Gallo Nero's motion to consolidate because the second action is not "pending" as required by CPLR 602. This Court also denied Gallo Nero's motion to stay the damages inquest in the second action because the hearing had already occurred.

Also on the May 13, 2014 record, Gallo Nero withdrew its motion for default judgment against the Trust Defendants and accepted their answer. Landlord withdrew its motion for default judgment on its counterclaims and accepted Gallo Nero's Reply to Counterclaims. The remainder of Landlord's motion, seeking dismissal or summary judgment, is analyzed below.

## **II. Analysis**

### **A. Motion to Dismiss**

Landlord moves under both CPLR 3211 and 3212. Gallo Nero argues that the branch of Landlord's motion under 3211, to dismiss, is untimely because it was made over 50 days after service of the Complaint.

The Court will analyze the motion as a motion for summary judgment. A motion for summary judgment is appropriate both because issue has been joined and because of the extensive history of this case. These parties have already litigated two related actions involving the Lease at issue. The parties have also conducted discovery and motion practice in the prior actions. This decision renders Gallo Nero's timeliness argument as to the motion to dismiss moot.

B. Motion for Summary Judgment

1. **Summary Judgment Standard**

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact.” CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562.

2. **Collateral Estoppel as to First, Second, Third and Fifth Causes of Action**

Landlord moves for summary judgment based primarily upon its affirmative defense of collateral estoppel. Landlord asserts that Gallo Nero’s first, second, third, and fifth causes of action, all asserting breach of contract, are barred by the Renewal Order and the Default Order. Gallo Nero responds that the Default Order entered against it in the second action cannot serve as a basis for collateral estoppel. Gallo Nero contends that the Default Order did not finally resolve the issues in the second action because Gallo Nero did not have an opportunity to contest the cause of the fire and the interpretation of Article 9 of the Lease.

In analyzing collateral estoppel, the Court of Appeals has stated that “the doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a full and fair opportunity to litigate the point.” *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985) (internal quotation omitted).<sup>1</sup>

First, the Court will consider whether the claims in this action arise out of the same issues previously decided. In the Default Order, Landlord sought both a declaration that the Lease was properly terminated under Article 9 due to Gallo Nero negligently causing the fire and an injunction preventing Gallo Nero from making any fire-related repairs. *See* Affirmation of Ricardo Vera (“Vera Affirm.”), Ex. Q. In this action, Gallo Nero’s second, third, and fifth causes of action allege that Landlord improperly terminated the Lease under Article 9 and that Landlord’s negligence caused the fire. *See* Compl. ¶¶ 28-63, 72-86.<sup>2</sup>

Given that Gallo Nero’s second, third, and fifth causes of action seek damages arising from Landlord’s termination of the Lease under Article 9 and the cause of the fire,

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<sup>1</sup> The Court will not analyze the preclusive effect of the Renewal Order because it was based upon an action for a declaratory judgment. Actions seeking solely declaratory judgments cannot serve as the basis for collateral estoppel, except as to the precise issue determined by the judgment. *See Jefferson Towers, Inc. v. Pub. Serv. Mut. Ins. Co.*, 195 A.D.2d 311, 313 (1st Dep’t 1993) (“[W]hile res judicata prevents litigation of a matter that could have been raised[,] . . . an exception . . . exists in declaratory judgment actions. The preclusive effect of the declaratory judgment is limited to the subject matter of the declaratory relief sought”). Therefore, the Court holds that collateral estoppel does not bar Gallo Nero’s first cause of action for breach of contract arising out of Landlord’s failure to respond to the lease renewal request.

<sup>2</sup> Although an action seeking solely a declaratory judgment cannot preclude a claim other than the issue of the declaration, *see supra* note 1, Landlord also sought an injunction in the second action. An action seeking an injunction can serve as the basis for collateral estoppel. *See Maflo Holding Corp. v. S.J. Blume, Inc.*, 308 N.Y. 570, 575 (1955) (“The final judgment in the prior injunction suit now bars the subsequent suit”).

this Court finds that Gallo Nero's second, third, and fifth causes of action arose out of the same issues previously decided in the Default Order.

After establishing that Gallo Nero's second, third, and fifth causes of action arose from the same issues previously decided, the Court must then determine whether Gallo Nero "had a full and fair opportunity to litigate the point." Under the Default Order, judgment was granted on default due to Gallo Nero's failure to file an answer.

Under New York law, a default judgment can serve as the basis for collateral estoppel under certain circumstances. For example, in *In re Abady*, 22 A.D.3d 71, 85 (1st Dep't 2005), the First Department held that "collateral estoppel may be properly applied to default judgments where the party against whom preclusion is sought appears in the prior action yet willfully and deliberately refuses to participate in those litigation proceedings or abandons them, despite a full and fair opportunity to do so."

More recently, in *Windley v. City of New York*, 104 A.D.3d 597, 598 (1st Dep't 2013), the First Department restated the circumstances under which a default judgment will support a finding of collateral estoppel. The *Windley* court noted that "[t]he Transit Authority had the requisite full and fair opportunity to litigate the issue in the prior action, but it failed to do so, and it has not offered any explanation for this failure." The *Windley* court concluded that "[u]nder the circumstances, the Transit Authority willfully and deliberately refuse[d] to participate in the prior action and collateral estoppel applies notwithstanding its default." *Id.* (internal citations and quotations omitted).

Here, the circumstances are akin to *Abady* and *Windley*. Gallo Nero participated in the action underlying the Default Order by appearing and unsuccessfully moving to compel Landlord to complete repairs on the premises. Further, although Gallo Nero defaulted by failing to file an answer, it did not seek to reargue or appeal the Default Order. Gallo Nero only sought to vacate the Default Order on May 18, 2014, nearly ten months after it was entered. On July 22, 2014, this Court held Gallo Nero failed to provide a reasonable excuse for the default and denied the motion.

The Court finds that Gallo Nero had the requisite full and fair opportunity to litigate the interpretation of Article 9 and the cause of the fire in the prior action, but failed to do so. The Court further finds that Gallo Nero willfully and deliberately refused to participate in the prior action. Accordingly, the doctrine of collateral estoppel applies to the Default Order and bars Gallo Nero's second, third, and fifth causes of action.

### **3. No Issue of Material Fact as to Fourth Cause of Action**

Landlord also moves for summary judgment against Gallo Nero as to the fourth cause of action. Gallo Nero's fourth cause of action asserts claims of breach of contract and unjust enrichment based upon Landlord's failure to return Gallo Nero's \$25,000 security deposit.

In support of its motion, Landlord submits the affidavit of Ira Meister, the property manager of the building ("Meister Affidavit"). According to the Meister Affidavit, Landlord applied the security deposit against a large rent arrears. *See* Meister

Aff. ¶ 6. Further, Exhibit U to the Meister Affidavit is the Tenant History Summary for Gallo Nero, showing a large balance due. *See* Meister Aff. Ex. U at 1.

Article 31 of the Lease allows Landlord to offset Gallo Nero's rent arrears with the security deposit. *See* Assante Aff. Ex. 1 at 5. The Court finds that Landlord has tendered evidence, by proof in admissible form, which disproves the fourth cause of action "sufficiently to warrant the court as a matter of law to direct judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Gallo Nero has failed to submit evidence or to address the rent arrears in its papers. Therefore, Gallo Nero has failed to raise an issue of fact requiring trial and Landlord is entitled to summary judgment on the fourth cause of action for breach of contract. *See Zuckerman*, 49 N.Y.2d at 562; *cf. Tewksbury Mgmt. Grp., LLC v. Rogers Invs. NV LP*, 110 A.D.3d 546, 547 (1st Dep't 2013) ("[T]he fourth cause of action is flatly refuted by the lease provision allowing defendant to use the security deposit towards plaintiff's unpaid rent obligations").

Finally, the unjust enrichment claim must be dismissed as duplicative of the breach of contract claim. *See Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236, 238 (1st Dep't 2000) (holding that the "cause of action for unjust enrichment, [which] seeks to recover a \$250,000 deposit . . . [is] barred by the existence of a valid and enforceable written contract"). Accordingly, Gallo Nero's fourth cause of action is dismissed in its entirety.

#### 4. Summary Judgment Premature as to First Cause of Action

In the remaining cause of action, Gallo Nero asserts that Landlord breached the Lease by “refus[ing] to offer the three-year extension.” *See* Compl. ¶ 17. Gallo Nero asserts that Landlord’s refusal to offer a lease extension caused it damage, such as “loss of revenue, inability to renovate and attorneys [sic] fees.” *Id.* at ¶ 24.

The original lease term ended February 28, 2013. The Lease stated that Gallo Nero could provide notice to Landlord of its intent to exercise its three-year renewal option within 180 days of the Lease expiration date, *i.e.* any time after August 28, 2012. Gallo Nero provided two lease renewal notices, both in September 2012.

Summary judgment on the first cause of action is premature at this point since there are issues of fact that warrant further discovery. *See Ashkenazi v. AXA Equitable Life Ins. Co.*, 91 A.D.3d 576, 577 (1st Dep’t 2012) (denying defendant’s motion as premature without prejudice to renew at the completion of discovery). For example, there has not yet been any discovery on the issue of Gallo Nero’s loss of revenue or inability to renovate.

At this juncture, neither party has demonstrated that Gallo Nero suffered or did not suffer solely speculative damages. Nor can the Court opine as to whether any recovery by Gallo Nero would be less than or greater than any debts Gallo Nero may have to Landlord, such as rent arrears, damage caused by the fire, or attorneys’ fees.

Therefore, the Court denies Landlord's motion for summary judgment on the first cause of action, without prejudice, pending further discovery on the speculative nature of Gallo Nero's purported damages.

*(Order of the Court appears on the following page.)*

**CONCLUSION**

Accordingly, it is hereby

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' cross-motion is granted in part, such that summary judgment is granted as to the second, third, fourth and fifth causes of action and is otherwise denied without prejudice; and it is further

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

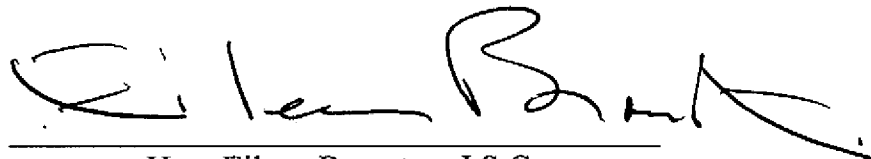
ORDERED that counsel for the parties are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on Tuesday, December 9, 2014, at 10:00 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York

September 23, 2014

ENTER:



Hon. Eileen Bransten, J.S.C.