

Salcedo v 906 Holding LLC

2019 NY Slip Op 35072(U)

December 3, 2019

Supreme Court, Bronx County

Docket Number: Index No. 26115/2019E

Judge: Howard H. Sherman

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT - COUNTY OF BRONX

PART 4

Juan Gomez Salcedo,

Plaintiff

-against-

906 Holding LLC,
Happy Garden 168, Inc., and
JoJoPizza II Corp.,

Defendants

DECISION/ORDER

Index No. 26115/2019E

Howard H. Sherman

JSC

The following papers numbered 1-5 on this motion by DEFENDANT HAPPY GARDEN 168 , INC.,
for summary judgment submitted November 8, 2019

	<u>PAPERS NUMBERED</u>	
Notice of Motion , Affirmation in Support , Exhibits A-D	1	
Affirmations in Opposition	2,3	
Affirmations in Reply	4,5	

Upon the foregoing papers this motion for an order awarding summary judgment in favor of Defendant HAPPY GARDEN 168 INC., dismissing the complaint and any and all cross-claims asserted against it is granted .

In this action plaintiff seeks damages for personal injuries alleged to have been sustained on August 21, 2018 in a trip-and-fall on a sidewalk in front of commercial premises located at 906 East 180th Street, Bronx, New York.

Defendant Happy Garden 168 Inc. (Happy Garden) moves for summary judgment dismissing the complaint on the grounds that it took possession of the commercial premises after the incident pursuant to a lease dated and commencing September 1, 2018. The motion is supported by a copy of the lease between Xiao Yu Zhu (Zhu) d/b/a Happy

Garden Chinese Restaurant and 906 Holdings LLC for the premises described as "Store #3 at 906 East 80th Street [Exhibit D]. The "LEASE dated September 1, 2018",¹ which contemplated the use of the premises as a Chinese restaurant, was executed by Zhu as tenant, and 906 Holdings LLC (906 Holdings) by Jailall Jaggohan as Landlord, was to commence on that date and expire August 31, 2028" unless earlier terminated pursuant to its terms. Also submitted is Zhu's affidavit attesting to his position as President of Happy Garden 168, Inc. and that corporation's September 12, 2018 Initial Filing with the New York State Department of State [Exhibit C]. Zhu attests that Happy Garden's restaurant opened at the subject location on October 1, 2018, and "[a]t no time prior to the above referenced dates was defendant Happy Gardens 168, Inc. in possession of or a tenant at any portion of 906 East 180th Street.. " [Affidavit ¶ 5].

906 Holdings by affirmation contends that the lease is not dated, and by its terms allows for a tenant, with the landlord's approval, to commence occupancy before the commencement date, and discovery should be permitted to explore these issues.

Plaintiff also raises these issues and maintains that the motion should be denied as facts sufficient to oppose the motion are unavailable to him (see, CPLR 3212(f))

¹The lease begins with this language, rendering unavailing the assertion that it is undated.

Discussion and Conclusions

Upon consideration of the submissions here, including the lease dated and effective September 1, 2018, as well as the personal guaranty of payment executed by Zhu incorporated therein, and the filing of the New York State Department of State Division of Corporation, and the affidavit of Zhu in support of the motion, the court finds that the defendant has met its prima facie burden to establish that Happy Garden was not in possession of the subject premises until after the commencement of the lease, and as a consequence on August 21, 2018 owed no duty of care to the plaintiff nor had assumed contractual obligations to the owner.

In opposition, neither plaintiff nor the building owner/landlord come forward with probative evidence to raise a triable issue of fact to rebut this showing. With respect to the argument concerning a possible earlier occupancy pursuant to 1 (A) of the lease, it is noted that such an occupancy can only be effected with the consent of the landlord, and the defendant owner comes forward with no proof to raise a material issue of fact that consent was granted, or even sought.

Accordingly, it is

ORDERED that the motion be and hereby is granted, and it is

ORDERED that the Clerk be and hereby is directed to enter summary judgment in

favor of HAPPY GARDEN 168, Inc., dismissing the complaint and any and all cross-claims asserted against it in the above-entitled action .

This shall constitute the decision and order of this court.

Dated: December 3, 2019



Howard H. Sherman