

Glaze Teriyaki, LLC v MacArthur Props. I, LLC
2020 NY Slip Op 31733(U)
June 3, 2020
Supreme Court, New York County
Docket Number: 653883/2013
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

Table with 2 columns: Case details (Plaintiff, Defendant) and Motion details (Index No., Motion Date, Motion Seq. No.). Includes decision title 'DECISION + ORDER ON MOTION'.

HON. BARRY R. OSTRAGER

This action is a commercial landlord-tenant dispute originally commenced by the tenant Glaze Teriyaki, LLC ("the Tenant") against its landlord MacArthur Properties I, LLC ("the Landlord") seeking a Yellowstone injunction to toll its time to cure alleged lease violations related to its operation of a restaurant at the premises, pending a determination as to whether the alleged violations were valid. As suggested by the 2013 Index Number, various Supreme Court justices have presided over this case since its commencement, and the parties have taken several trips to the Appellate Division. The tenancy was commenced by a ten-year lease dated July 31, 2010 for the period through July 31, 2020 (NYSCEF Doc. No. 250), but it is undisputed that the Tenant's possessory rights were terminated based on the Landlord's Counterclaims and that the Tenant was evicted on April 20, 2018 (see Landlord's Statement of Material Facts ¶ 24, NYSCEF Doc. No. 244). Thus, all that remains of this action are those Counterclaims asserted by the Landlord in its Answer that have not either been rendered moot by the Tenant's eviction or otherwise resolved by the parties or by judicial determination.

1 The procedure was first authorized by the Court of Appeals in its decision First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 (1968), and has been frequently used by commercial tenants since that time and continuing today.

Before the Court at this time is the Tenant's motion to confirm the Report and Recommendation of Special Referee Phyllis Sambuco entered February 13, 2020 (the "Referee's Report", NYSCEF Doc. No. 232) and the Landlord's cross-motion to reject the Referee's Report and for summary judgment awarding the Landlord a money judgment against the Tenant for rent-related sums allegedly due through the date of the Tenant's eviction. For the reasons stated below, the Tenant's motion is granted and the Landlord's cross-motion is denied.

Background Facts

The Referee's Report was issued in response to an Order of Reference made by this Court related to the Landlord's motion (seq. 008), which had sought a money judgment for "damages resulting from Glaze's holdover at two times the reserved rent for the holdover period from January 22, 2014, the date of lease termination, to April 20, 2018, the date of Glaze's eviction, in the total amount of \$954,605.40, plus prejudgment interest at 18% per annum and late fees at 5% in accordance with the terms of the Lease" (Notice of Motion, NYSCEF Doc. No. 202). In opposition to that motion, the Tenant had argued that the Landlord's claim was barred at least in part by the parties' settlement of the Landlord's rent arrears claims before JHO Ira Gammerman (see Transcript of October 13, 2016 Proceedings before JHO Gammerman, NYSCEF Doc. No. 165, and related Order, NYSCEF Doc. No. 166, hereafter "the Settlement"). In reply, the Landlord had disputed that the Settlement covered the claims at issue in that motion.

This Court therefore determined that the best course of action was to refer the matter to JHO Gammerman for a recommendation on the issues raised by that motion. Accordingly, on December 13, 2018, this Court issued a Decision and Order of Reference (NYSCEF Doc. No. 225). There, the Court referred the matter to JHO Gammerman to hear and recommend as to two specific issues: "(1) the issue whether defendant's right to recover the holdover rent and interest and fees claimed to be due is barred in whole or in part by the October 13, 2016 settlement on the record of certain

issues before Judicial Hearing Officer Gammerman; and (2) the issue of the specific amount of damages, interest and fees, if any, to which defendant is entitled based on the claims asserted in the motion.” As JHO Gammerman was not able to proceed with the reference, the matter was assigned to Special Referee Phyllis Sambuco, who issued the Report and Recommendation at issue here.

In her twelve-page Report, Referee Sambuco found that “the defendant, MacArthur Properties I, LLC, has not demonstrated that an award of a money judgment is warranted at this juncture. I report my findings as indicated above and recommend that the honorable court, upon submission of this report and a motion pursuant to CPLR Rule 4403, confirm the report with respect to its findings.” (NYSCEF Doc. No. 232, pp. 11-12).

In the Report, the Referee directly addressed the first issue of the effect of the Settlement before JHO Gammerman, quoting a rather extensive exchange between counsel and the JHO with emphasis on certain language. In particular, the Referee emphasized statements by the Landlord’s counsel confirming that “the settlement is that the tenant has agreed to pay the total sum of **\$70,00.00 in full settlement of the arrears in rent and/or use and occupancy through September 28th, the end of September, 2016.**”² JHO Gammerman responded: “Other than the October rent, this payment will bring the tenant in full compliance with respect to that aspect of the lease relating to rent payments.” In response, the Landlord’s attorney agreed.

After some further colloquy, the Landlord’s attorney sought to reserve certain claims, stating that “the parties, however, specifically, reserve and preserve any and all claims between them in connection with this lawsuit, and all claims are preserved, **other than this particular issue concerning the non-payment of rent through September of 2016.**” The Tenant’s attorney responded to clarify the reservation of rights, stating that: “**And I just wanted to add that when**

² Statements in bold reflect emphasis added by Referee Sambuco in her Report.

we refer to rent, it's not only base rents, it's also additional rents, as well.” The JHO then confirmed the Settlement included “Any amount due under the lease.” The Tenant’s attorney acknowledged that understanding, repeating “Any amount due under the lease.” The Landlord’s attorney then confirmed his agreement, stating “That’s correct.”

After quoting this colloquy and more, Referee Sambuco in her Report recited a rather extensive review of the case law requiring the enforcement of valid stipulations, such as the one presided over by JHO Gammerman. The Referee then concluded as follows: “Based on the finding that the Stipulation of Settlement is valid, it is recommended that defendant MacArthur be deemed barred from seeking any additional monetary award for rent and/or use and occupancy, interest, and additional rents and other fees claimed due from plaintiff [Tenant] pursuant to the subject lease for any dates prior to October 1, 2016.”

The Landlord now argues to this Court that the Referee has misconstrued the Settlement, which was not intended to include “holdover rent” that was not chargeable until some time later after the Appellate Division upheld the Landlord’s cancellation of the Tenant’s Lease effective January 22, 2014. The Court rejects the Landlord’s argument and accepts the findings of the Referee.

As the First Department has explained, “generally, courts will not disturb the findings of a referee 'to the extent that the record substantiates his [her] findings and they may reject findings that are not supported by the record'.” *Kardanis v Velis*, 90 AD2d 727 (1st Dept 1982), quoting *Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of N. Y.*, 81 AD2d 64, 71, *rev'd on other grounds* 55 NY2d 512. The Court here finds the Referee’s conclusions about the effect of the Settlement are supported by the record, which included the transcript of proceedings before JHO Gammerman. The Court finds that the wording of the Settlement is extremely broad and includes not only base rent but all other charges that may be characterized as

additional rent or use and occupancy or other rent-related charges or fees for the period at issue. As JHO Gammerman succinctly stated, the Settlement includes “Any amount due under the lease” through September 30, 2016.

The Court further construes the reservation of rights as applying only to post-eviction damages claims relating, for example, to the re-rental of the premises to a new tenant before the original 2020 end date of the Tenant’s Lease. The reservation of rights does not allow for a claim today for “holdover rent” under the Lease for the period pre-dating the Settlement. Accordingly, the Court grants the Tenant’s motion insofar as it seeks to confirm the Referee’s Report, finding that all rent-related claims pre-dating the Settlement period are barred, and denies the Landlord’s cross-motion for a money judgment for additional monies allegedly due before October 1, 2016.

The Court now turns to the second prong of the reference, which seeks a recommendation regarding the specific amount of damages, interest and fees, if any, to which defendant is entitled based on the claims asserted in the Landlord’s motion sequence 008. As to that issue, the Referee recommended (at p 11) that “having failed to state grounds for an award of a money judgment, and having failed to meet the burden of proof necessary for an award of summary judgment pursuant to CPLR 3212, defendant MacArthur’s motion for a money judgment be denied.” Again, the Court agrees with the Referee that the Landlord has failed to establish its right to additional relief under motion sequence 008.³

In her Report (at p 8), Referee Sambuco examined the Landlord’s request for a money judgment in motion sequence 008 by applying the standard for summary judgment, which required the Landlord to make a “prima facie showing of entitlement to judgment as a matter of law,

³ The Court also rejects the Landlord’s threshold argument that the Referee had agreed to determine only limited legal issues and then schedule a hearing. The Report makes no mention of such an agreement, the Landlord is unable to document it, and the Tenant’s attorney states he does not recall it.

tendering sufficient evidence to eliminate any material issues of fact from the case ... 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 NY2d 851, 853 (1985). The Referee concluded that the Landlord had failed to meet its burden. She criticized the affidavit of Viena Margulies, the Landlord’s Vice President, for its failure to confirm Ms. Margulies’ familiarity with the Tenant’s Lease or personal knowledge of the Landlord’s record keeping practices. Much of the affidavit, she noted, consisted of citations to propositions of law which could not be properly made by a lay witness.

The Referee added (at pp 9-10) that the motion included no documentary evidence that the money allegedly “due and owing to defendant MacArthur is in fact, due and owing. There is no proof that plaintiff [Tenant] failed to remit payments after October 1, 2016. There is no proof that plaintiff failed to tender the agreed upon amount set forth in the October 13, 2016 Stipulation of Settlement, which remarkably, is not mentioned at all.” Having reviewed motion sequence 008 again in its entirety, the Court agrees with the Referee that the conclusory claims in the Margulies affidavit failed to meet the Landlord’s burden of proof. Therefore, the Court grants the Tenant’s motion to confirm that part of the Referee’s Report and denies the Landlord’s cross-motion to reject it.

As noted earlier, in addition to urging the Court to reject the Referee’s Report, the Landlord in the cross-motion at issue here affirmatively moved for a money judgment, at a minimum for post-Settlement rent-related charges through the Tenant’s eviction in April 2018. However, in motion sequence 008 reviewed by the Referee the Landlord had sought rent-related charges from January 22, 2014 when the Lease was terminated through April 20, 2018. Therefore, the request in the present motion 009 overlaps with the request in the prior motion 008. Having moved once for summary judgment in its favor, and having received a determination on the merits, the Landlord

cannot make a second summary judgment motion for the same relief under the circumstances presented here. *See Amill v Lawrence Ruben Co.*, 117 AD3d 433 (1st Dep't 2014) (successive summary judgment motions should only be entertained where there is a showing of newly discovered evidence or other sufficient justification). Therefore, the Landlord's cross-motion is denied in its entirety on the merits, and no need exists for the Court to address the parties' arguments about whether the "holdover rent" sought constitutes an unenforceable penalty.

Even if the Court were to review the instant motion on the merits, the requested relief would be denied. Although Ms. Margulies in her affidavit in support of the instant motion (NYSCEF Doc. No. 242) does address some of the issues raised by the Referee such as Ms. Margulies' familiarity with the Lease and the Landlord's record keeping practices, and although the Landlord now provides a rent ledger (NYSCEF Doc. No. 259), the allegations remain overly conclusory and the proof insufficient to establish a right to summary judgment. As an example, the ledger begins with a balance on October 1, 2016 of nearly \$130,000, even though the Settlement resolved that the balance through September 30, 2016 was only \$70,000. The ledger continues through the date of the Tenant's eviction with countless questionable late charges and unauthorized legal fees added. The Tenant's principal has confirmed the Settlement monies were paid in full (see Krug Aff, NYSCEF Doc. No. 268), and the ledger does include some payments, but on the whole the ledger is incomprehensible to the Court and not adequately explained.

In light of these rulings, it appears the central, and perhaps only, issue remaining in this case relates to the Landlord's counterclaim for post-eviction damages. It appears from the record that the Tenant corporation was dissolved on March 6, 2019 (NYSCEF Doc. No. 267) and that the Landlord was able to rent the premises to a new tenant after plaintiff was evicted. It is thus unclear what relief, if any, the Landlord would be pursuing here in this already over-litigated case. To determine how to move forward, the Court directs that the Landlord efile a letter not exceeding 3 pages by

June 22, 2020 outlining the outstanding claims and their approximate value and addressing briefly any impact of the Tenant’s dissolution. The Tenant shall respond by July 13, adding what discovery, if any, the Tenant would request related to the open issues. A status conference is set for July 21, 2020 at 11:00 a.m. to discuss the open issues with the Court.

Accordingly, it is hereby

ORDERED that the motion by plaintiff Glaze Teriyaki, LLC to confirm the Report and Recommendation of Special Referee Sambuco entered February 13, 2020 is granted, the cross-motion of defendant MacArthur Properties I, LLC to reject the Report and for a money judgment in its favor is denied, and all pre-eviction rent-related claims are denied; and it is further

ORDERED that counsel shall follow the directives set forth herein regarding any outstanding issues in this case and appear for a status conference on July 21, 2020 at 11:00 a.m.

Dated: June 3, 2020

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE