Hongqing Sun v New World Shopping Ctr. NY, Inc.
2020 NY Slip Op 31974(U)
May 29, 2020
Supreme Court, Queens County
Docket Number: 704519/19
Judge: Timothy J. Dufficy
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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: HON. TIMOTHY J. DUFFICY **IAS PART 35**
Justice

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HONGQING SUN,

Plaintiff,

-against-

Index No.: 704519/19
Mot. Date: 2/11/20
Mot. Seq.: 1

NEW WORLD SHOPPING CENTER NY, INC., PETER HUANG , WILLIAM SHAO, and JIN PING ZHU,

Defendants.

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The following papers were read on this motion by defendants for summary judgment dismissing the complaint, pursuant to CPLR 3212; to dismiss the allegations in the complaint which seek liability as against the individual defendants Peter Huang (also known as Xian Ming Huang), William Shao and Jin Ping Zhu; and for summary judgment on their counterclaims for attorneys fees.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	EF4 - EF20
Answering Affidavits - Exhibits.....	EF24-EF26
Reply Affidavits.....	EF27

Upon the foregoing papers it is ordered that the motion is determined, as follows:

Plaintiff seeks damages based upon an alleged breach of a commercial rental agreement by defendants. The record indicates the following: plaintiff leased a certain space known as Space 230 (Space 230) on the second level of the New World Mall, located at 136-20 Roosevelt Avenue in Flushing, New York (NWSC or the Shopping Center), pursuant to an Agreement made as of April 4, 2017, between NWSC and plaintiff (the Agreement). Prior to renting space 230, the plaintiff rented space 225 in the Shopping Center. Due to construction work being performed in the Shopping Center, the plaintiff's rental was moved

from space 225 to Space 230. Plaintiff signed the Agreement, on April 5, 2017, and initialed each page of the Agreement. Further, the plaintiff signed the Rules and Regulations annexed to the Agreement. Pursuant to the License Agreement, the plaintiff agreed to pay to NWSC (i) a non-refundable lump sum payment of five thousand dollars ($5,000.00) upon execution of the Agreement, as a set-up and space preparation fee, and (ii) five thousand dollars ($5,000.00) per month for the period of May 1, 2017 through February 28, 2018, and (iii) $5,200.00 per month for the period of March 1, 2018 through February 28, 2019, and (iv) monthly maintenance fees pursuant to the calculations set forth in paragraph 49(c) of the Agreement. Additionally, because the plaintiff was provided with access to Space 230, on or about April 15, 2017, she paid one-half of the stipulated monthly charge for April 2017, together with one-half of the monthly maintenance charge for April, for a total of $2,875.00. Further, as and for a security deposit, the plaintiff agreed to loan NWSC thirty thousand dollars ($30,000.00) for a term of fifty-eight and a half (58.5) months, on or before April 15, 2017, to be held as a security deposit for Space 230. Upon execution of the Agreement, the plaintiff tendered to NWSC a total of twenty-two thousand, eight hundred and seventy-five Dollars ($22,875.00).

In or about April 2017, the plaintiff further tendered ten thousand dollars ($10,000.00) to NWSC, thereby paying the security deposit and the April 2017 fees. Starting in June 2017, and continuing in July, August, October and December of 2017, the plaintiff continually paid her rental fees, albeit sometimes late. Throughout this period of time, Huang allegedly had numerous conversations with the plaintiff in person, and by text, regarding her fee arrears. Plaintiff made payment to NWSC in response to Huang's verbal and written requests, but continued to default on making payment of the fees when due. Again, in January, the plaintiff defaulted in paying her fee. Accordingly, Huang executed a five (5) day Notice of Termination addressed to the plaintiff, dated January 16, 2018 ("January Notice of Termination"), pursuant to paragraph "2" of the Agreement. The January Notice of Termination expired on January 22, 2018. Plaintiff paid some, but not all of the fee arrears then due to NWSC after service of the January Notice of Termination. However, as an accommodation to the plaintiff, NWSC allowed the her to remain in Space 230 upon her assurances that she would cure her remaining default.

Plaintiff continued to make partial payments to NWSC, but was consistently in arrears throughout the first half of 2018. As a result, NWSC delivered to the plaintiff termination notices, dated May 7, 2018, July 20, 2018 and July 31, 2018 (collectively, the 2018 Notices of Termination). After service of each of the 2018 Notices of Termination, the plaintiff would speak with Huang by phone or by text message and request that the License Agreement not be terminated. Plaintiff would typically make a partial payment, pursuant to each of the 2018 Notices of Termination, but plaintiff never paid the fee arrears in full owed to NWSC.

By notice of termination, dated August 21, 2018 (August Notice of Termination), New World terminated the Agreement, and upon the expiration of the termination date, sealed the entrance to Space 230, thereby preventing the plaintiff from accessing or using Space 230. In response to the August Notice of Termination, the plaintiff sent Huang a text message, on September 1, 2018, requesting access to Space 230 and promising payment. Plaintiff sent more text messages to Huang that day, claiming that the delay in payment of fees were "absolutely [her] fault", and that she would deliver the payment "later." Despite promising to pay the overdue fees several times, in September 2018, the plaintiff did not make a payment to New World, until on or about October10, 2018. On October 10, 2018, the plaintiff and New World entered into a Termination and Settlement Agreement (the Settlement Agreement), whereby the plaintiff agreed to pay the following amounts: (A) eight thousand dollars ($8,000.00) upon execution of the Settlement Agreement; (B) six thousand dollars ($6,000.00), on or before October 24, 2018; and (C) five hundred dollars ($500.00) for New World's legal fees.

The Settlement Agreement provided that, upon the plaintiff making the payments in accordance with the Settlement Agreement, the License Agreement would be reinstated. The Settlement Agreement explicitly stated that if the plaintiff failed to make the six thousand dollars ($6,000.00) payment, on or before October 24, 2019, the License Agreement would remain terminated. Upon signing the Settlement Agreement, plaintiff paid NWSC eight thousand dollars ($8,000.00), but thereafter, only an additional four thousand dollars ($4,000.00), which was paid late on October 28, 2018, instead of the required six thousand five hundred dollars ($6,500.00) that the plaintiff agreed to pay by October 24, 2018, pursuant to the Settlement Agreement. Defendants submit that based on the plaintiff's

aforesaid default, and in an abundance of caution to make it clear to the plaintiff that her Agreement remained terminated, New World served the plaintiff with a five (5) day notice of termination, dated November 1, 2018 (the November Notice of Termination), which expired on November 11, 2018, even though NWSC was under no obligation to do so as the License Agreement was already terminated pursuant to the August Notice of Termination.

On November 12, 2018, upon the expiration of the November Notice of Termination, Huang caused the entrance to Space 230 to be sealed once again, thereby again barring the plaintiff from accessing or using Space 230. Plaintiff then contacted Huang by phone, on November 13, 2018, and requested that New World unseal the door to Space 230. Huang advised the plaintiff that she had to pay the outstanding fee arrears in order to vitiate the November 2018 Notice of Termination and reinstate the Agreement. Plaintiff did not pay the outstanding fee arrears. Plaintiff also did not remove her property from Space 230 or request access to Space 230 to remove her property. Plaintiff's property remained in Space 230 for several months. Eventually, in April 2019, Huang caused all property in Space 230 to be removed from the space and placed into storage in the Shopping Center. Defendants submit that the plaintiff did not contact Huang to retrieve her property, either by text message or by a phone call for more than five (5) months. Finally, on or about April 19, 2019, after the property had just been moved into storage, the plaintiff contacted Huang and inquired about her property. Huang advised the plaintiff that he would have her property moved back to Space 230 so that she could retrieve it, and he did. On or about May 1, 2019, the plaintiff came to the Shopping Center and removed her property from Space 230.

Pursuant to paragraph "3 l' of the License agreement, the plaintiff was required to remove all of her personal property from Space 230 upon the termination of the License Agreement. Specifically, paragraph "31" of the License Agreement provides in pertinent part that:

> “Licensee's failure to remove all or a part of Licensee's personal property and/or trade fixtures on the expiration or earlier termination of this Agreement will be deemed an abandonment to Licensor of such personal property and/or trade fixtures, and, if Licensor elects to remove all or any part of such property and/or fixtures."

Furthermore, under paragraph "30" of the . . . Agreement, entitled "Waiver," the plaintiff expressly waived any and all rights to redemption in the event she was evicted or dispossessed for any cause. Additionally, under paragraph "30" of the License Agreement, the plaintiff waived all claims against NWSC for the damages or theft of her property, and was required to maintain her own insurance to cover any such loss, damage or theft.

Plaintiff commenced the instant action for, *inter alia*, breach of contract. In moving for dismissal of the action, the defendants submit that the relationship between NWSC and the plaintiff is set forth in the "License Agreement"; that the subject Agreement is a license agreement for a commercial space; that New World had the right to terminate the License Agreement for no reason, or by reason of plaintiff's default in paying the license fees, which occurred in this case. Defendants further submit that since neither Huang, William Shao or Jin Ping Zhu are a party to the License Agreement, the plaintiff's claims and her complaint should be dismissed as against defendants Peter Huang, William Shao and Jin Ping Zhu; and that the License Agreement provides for attorneys fees to defendants. Plaintiff opposes the motion and contends that the parties entered into a "lease" and not a license agreement.

Discussion

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 325 [1986]). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 NY2d 1065, 1067 [1979]). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio,* 81 NY2d 1062, 1063 [1993] (emphasis added)). Resolution of this case centers upon whether the Agreement between plaintiff and defendants was a lease or a license. Upon review of the submissions, the court finds that there is at least an issue of fact as to whether the Agreement was for a license or a lease.

The Court of Appeals has defined the term "lease" as "the transfer of absolute control and possession of property at an agreed rental" *(Feder v Caliguira*, 8 NY2d 400, 404; *People*

v Horowitz, 309 NY 426). Further, "a tenancy involves an interest in real property which passes to the tenant, and a possession exclusive even of that of the landlord, except as the lease permits the landlord's entry, and saving always his right to enter to demand rent or to make repairs." *(Statement, Inc. v Pilgrim's Landing, Inc.*, 49 AD2d 28, 33 [4th Dept 1975], quoting *Layton v Namm & Sons*, 275 App Div 246, 249, *affd* 302 NY 720.) Thus, "[t]he central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental" (*Mirasola v Advanced Capital Group, Inc*., 73 AD3d 875, 876 [2d Dept 2010]; *Matter of Nextel of New York, Inc. v Time Mgt. Corp.,* 297 AD2d 282, 282 [2d Dept 2002]; *Matter of Dodgertown Homeowners Assn. v City of New York*, 235 AD2d 538, 539 [2d Dept 1997]; *Women's Interart Ctr., Inc. v New York City Economic Dev. Corporation* [*EDC*], 97 AD3d 17, 21 [1st Dept 2012], *lv. dismissed* 20 NY3d 1034 [2013]; *Matter of Davis v Dinkins,* 206 AD2d 365 [2d Dept 1994]). A license gives no interest in land; It confers only the non-exclusive, revocable right to enter the land of the licensor to perform an act (*see Miller v City of New York,* 15 NY2d 34 [1964]; *Linro Equip. Corp. v Westage Tower Assocs.,* 233 AD2d 824 [3d Dept 1996]; 49 NY Jur 2d, Easements, § 196).

The Agreement contains several provisions ordinarily found in leases such as those governing indemnification, repairs and alternations, insurance, notices, surrender of premises, and assignment and subletting. (*See Nextel of NY, Inc. v Time Mgt. Corp.,* 297 AD2d 282, 283 [2d Dept 2002] [agreement found to be lease as it contained provisions typical of lease, such as rental term for five years with automatic renewal and expressly granted right of quiet enjoyment]). Specifically, the Agreement includes the following provisions typical of a lease, including exclusive use of a specifically-bounded 150 square foot area (*see* the Preamble and Exhibit B of the Agreement); a 58.5-month term (*see* Paragraph 2 of the Agreement); fixed rent (*see* Paragraph 3(B) of the Agreement); payment of specific percentages of real estate taxes and common area maintenance fees (*see* Paragraph 3(c) of the Agreement); a security deposit, albeit characterized as loan (*see* Paragraph 4 of the Agreement); payment of utilities (*see* Paragraph 8 of the Agreement); alterations, additions, improvements, or renovations (*see* Paragraph 12 of the Agreement); the ability to install signage (*see* Paragraph 17 of the Agreement);casualty damage and injury (*see* Paragraph 19 of the Agreement);Indemnification (*see* Paragraph 20 of the Agreement);

Insurance provisions (*see* Paragraph 21 of the Agreement);a merger clause (*see* Paragraph 23 of the Agreement); the ability to seek recourse against Defendants for breaches of the Agreement (*see* Paragraph 24 of the Agreement); a clause subordinating the Agreement to the ground lease (*see* Paragraph 25 of the Agreement); Assignment provisions (*see* Paragraph 28 of the Agreement); the ability to pass the Agreement to plaintiff's successors, heirs, and assigns (*see* Paragraph 29 of the Agreement); holdover provisions (*see* Paragraph 32 of the Agreement); mortgage subordination provision (*see* Paragraph 33 of the Agreement); Notice provisions (*see* Paragraph 45 of the Agreement); and, perhaps most significantly, renewal provisions (*see* Paragraph 46 of the Agreement).

Furthermore, the "critical question in determining the existence of a lease . . . is whether exclusive control of the premises has passed to the tenant" (*Women's Interart Ctr., Inc. v New York City Economic Dev. Corp.*, 97 AD3d 17, 21 [1st Dept 2012], *lv dismissed* 20 NY3d 1034 [2013]). Here, the plaintiff had exclusive possession and control of the premises, based on the following factors: the premises was a defined 150-square-foot enclosed space, which was particularly defined as "Exhibit B" to the Agreement; plaintiff had keys to the premises; plaintiff decided who could enter the premises and could deny access to the members of the public; plaintiff decided what merchandise to sell in the premises; plaintiff decided the sale price of the merchandise; plaintiff decided when to open and close for business as nothing in the Agreement or Rules and Regulations specified hours of operation; plaintiff decided how to design, build, construct, alter, modify, and decorate the premises; plaintiff paid for her own utilities; plaintiff paid for a portion of real estate taxes and common area maintenance charges based on the square footage of the premises; plaintiff decided whether to hire or fire employees and how and when to schedule employees; and no other tenant, licensee, or occupant of the defendants had the right to use or occupy the space. In all, the parties' agreement "contain[ed] many provisions typical of a lease and confer rights well beyond those of a licensee or holder of a mere temporary privilege" (*Matter of Nextel of New York, Inc. v Time Mgt. Corp.*, 297 AD2d 282, 283 [2d Dept 2002], quoting *Miller v City of New York,* supra at 37; *see Tsabbar v Auld,* 276 AD2d 442 [1st Dept 2000]).

Furthermore, a license must be revocable "at will" *and* "without cause" (*American Jewish Theatre, Inc. v Roundabout Theatre Co., Inc.*, 203 AD2d 155 [1st Dept 1994] (emphasis added) ("Whereas a license connotes use or occupancy of the grantor's premises,

a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor. The former is cancellable at will, and without cause (*Hartzler v Westair*, 55 AD2d 905 [2d Dept 1977] (Where one party's interest in another's real property exists for a fixed term, not revocable at will, and terminable only on notice, a landlord-tenant relationship has been created). The instant Agreement is only terminable on notice. The Agreement states in Paragraph 2 that "this Agreement may be cancelled... at Licensor's sole discretion with or without cause, by giving Licensee five (5) days prior written notice." Nowhere in the subject Agreement does it say that it is revocable "at will." The term "at will" does not appear at all in the Agreement. Consequently, the Agreement does not meet the "personal," "non-assignable," or"revocable at will" requirements of licenses (*Z. Justin Mgt. Co., Inc. v Metro Outdoor, LLC*, 137 AD3d 577, 578 [1st Dept 2016]).

Furthermore,"[t]hat a writing refers to itself as a license or lease is not determinative: rather, the true nature of the transaction must be gleaned from the rights and obligations set forth therein" (*Union Square Park Community Coalition, Inc. v New York City Department of Parks and Recreation*, 22 NY3d 648, 656 [2014]). Accordingly, the branch of the motion which is for summary judgment in favor of NWSC, is denied.

The branches of the motion which are to dismiss the claims against Huang, Shao and Zhu, as individuals, are granted. "Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 722 [2d Dept 2009], quoting *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104 [2009]). Furthermore, persons may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts (*see Westminster Constr. Co. v Sherman,* 160 AD2d 867 [2d Dept 1990]; *Robinson v Paramount Pictures Corp.,* 112 AD2d 208 [2d Dept 1985]; *Steelmasters, Inc. v Household Mfg. Co.,* 40 AD2d 963 [1st Dept 1972]). Since defendants Huang, Shao and Zhu were not parties to or signatories to the Agreement, they cannot be held personally liable for any of the causes of action (*see Wiernik v Kurth,* 59 AD3d 535, 537 [2d Dept 2009]). There is no evidence that Huang was, at any time, acting for his own benefit or self-interest, and did not enter into any agreements with the plaintiff. Huang only executed notices of termination on behalf of NWSC, as manager.

There are no allegations that Shao and Zhu acted on behalf of NWSC in this matter. They are sued merely as managers of the company.

Furthermore, to the extent that any of the three individuals have an ownership interest in NWSC, "[t]he general rule ... is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*Vivir of L I, Inc. v Ehrenkranz*, 145 AD3d 834, 835-36 [2d Dept 2016], *quoting East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.,* 66 AD3d 122, 126 [2d Dept 2009], *affd.* 16 NY3d 775 [2011]). "The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.,* 66 AD3d at 126). "A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*id.*; *see Matter of Morris v New York State Dept. of Taxation & Fin.,* 82 NY2d 135, 140–142 [1993]). "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" (*Matter of Morris v New York State Dept. of Taxation & Fin.,* 82 NY2d at 141–142 [citation omitted]). "Factors to be considered in determining whether the owner has 'abused the privilege of doing business in the corporate form' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' " (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.,* 66 AD3d at 127, *quoting Millennium Constr., LLC v Loupolover,* 44 AD3d 1016, 1016–1017). Here, there is no evidence warranting the piercing of the corporate veil so as to hold Huang, Shao and Zhu personally liable for NWSC's alleged breach of contract.

As for the branch of defendants' motion which is for summary judgment on its counterclaim for attorneys' fees, at this point it is premature to decide if the defendants are the prevailing parties (*Wirth v Chambers-Greenwich Tenants Corp.*, 87 AD3d 470, 474

[1st Dept 2011]; *see e.g. Board of Mgrs. of 55 Walker St. Condominium v Walker St.,* 6 AD3d 279 [1st Dept 2004]).

Accordingly, it is hereby

ORDERED that the branch of defendants' motion which is for summary judgment dismissing the claims against NWSC is denied; and it is further

ORDERED that the branches of defendants' motion which are to dismiss the claims against the individual defendants Huang, Shao and Zhu are granted; and it is further

ORDERED that the branch of defendants' motion which is for summary judgment on their counterclaim for attorneys' fees is denied, as premature.

Dated: May 29, 2020

TIMOTHY J. DUFFICY, J.S.C.

FILED

5/29/2020
2:16 PM

COUNTY CLERK
QUEENS COUNTY