

**HPG 29 2nd Ave LLC v Neapolitan Express  
Store 1029 LLC**

2020 NY Slip Op 33779(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 650220/2020

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

-----X

**INDEX NO. 650220/2020**

HPG 29 2ND AVE LLC,

**MOTION DATE 11/09/2020**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

NEAPOLITAN EXPRESS STORE 1029  
LLC, NEAPOLITAN EXPRESS LLC AND, MAX CRESPO

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 104, 105, 106, 107

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment as to four of its causes of action is granted as to liability only. The cross-motion by defendants for a continuance, to dismiss the complaint and to compel discovery is denied. (The Court did not consider the reply to the cross-motion).

**Background**

This case arises out of the purported breach of a commercial lease by defendant Neapolitan Express Store 1029 LLC ('Tenant'). The remaining defendants were guarantors to the lease. Plaintiff claims that the Tenant failed to pay the rent and abandoned the premises prior to the expiration of the lease without notice. Specifically, plaintiff claims that after six months of Tenant's occupancy, Tenant had only made a single \$10,000 rent payment. Plaintiff acknowledges that it drew down on the security deposit (which was for \$108,000) on June 21, 2019, which left a balance of \$10,707.

Plaintiff claims that it sent a letter to Tenant demanding that it replenish the security deposit but that Tenant failed to do so and failed to make any more payments. It also argues that Tenant left the property on August 23, 2019 without any notice.

Plaintiff claims that \$559,522.63 is due, which is comprised of \$310,165.63 in rent and additional rent (including late fees and other charges) through September 2020, plus \$59,007.27 in rent from September 2020 through December 2020, \$140,350 in additional damages due to the condition in which Tenant left the premises plus \$50,000 in broker's fees used to find a new tenant. Plaintiff also seeks \$36,660.92 in legal fees as well as the dismissal of defendants' affirmative defenses and counterclaims.

In opposition and in support of their cross-motion, defendants claim that plaintiff failed to meet its prima facie case against Tenant, it failed to serve the predicate notices, the guaranty terminated on the date the Tenant vacated the premises, defendant Crespo is protected from liability, there was fraud in the lease assignment and that plaintiff agreed to accept back rent as full payment.

Defendants claim that there was a lease signed in August 2017 by another entity (Thompson Pizza) and that Crespo agreed to take over the lease once it became clear that Thompson Pizza was going to fail. Defendants admit that Crespo also entered into a good guy guaranty individually and on behalf of Neapolitan Express, LLC. Defendants admit that after taking over in March 2019, it was only able to make a single \$10,000 payment in the first approximately five months due to poor cash flow. Defendants then decided to move out and vacated by August 3, 2020.

## Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Although the parties submitted voluminous briefs, the essential facts of this case are clear. Defendants took over the lease of a failing pizza shop and, unfortunately, were unable to turn a profit. They didn’t pay the rent and left the premises. Despite defendants’ efforts to avoid the consequences of breaching the lease, they did not raise a sufficient issue of fact to defeat plaintiff’s motion or cite an adequate basis to grant their cross-motion.

Plaintiff demonstrates that it sent the required notices of default (NYSCEF Doc. Nos. 61, 94-96). It also sufficiently argued that it properly drew down on the security deposit and that defendants' liability would be significantly increased had plaintiff not done this.

Plaintiff also established that defendants simply abandoned the premises without proper notice. There is nothing in defendants' opposition and cross-motion to suggest that the property was surrendered under the terms of the lease. There are no emails, letters or other documents that show that plaintiff was given proper notice of defendants' intention to vacate. This implicates the guaranty, which exempts the guarantors from having to pay additional rent if the Tenant gives thirty days notice of an intent to vacate as well as complies with other obligations (NYSCEF Doc. No. 59).

The closest defendants get to demonstrating notice is an email from July 2019 between members of plaintiff which contains an observation that a maintenance person said it seemed that defendants were leaving (NYSCEF Doc. No. 89). This email, which is hearsay, is not a basis upon which defendants can rely for their claim that plaintiff had proper notice of a vacatur. Moreover, a text message from defendant Crespo to plaintiff's principal during this same time period affirmed that no one was moving out (NYSCEF Doc. No. 97).

The Court also observes that plaintiff established the numerous ways in which the store was altered in violation of the lease, including photos that were sent to defendants (NYSCEF Doc. No. 63). Although defendants claim that they made improvements to the premises, that is not the same as returning the property to the condition it was when it was leased. However, as discussed below, the Court finds that a hearing is required to explore the amount of damages due to plaintiff. The Court cannot simply credit the damages plaintiff claims it is due to fix the premises.

To the extent that Crespo was not represented by counsel when he took over the lease, the Court finds that it is immaterial. Crespo entered into a sophisticated transaction to take over a business with a significant monthly rent. He should have known that using an attorney was a good idea and cannot now claim that he should be able to evade responsibility because he chose not to consult an attorney before taking over a lease that allegedly did not have certain changes that the parties had discussed orally. Crespo cannot add terms to a validly executed agreement.

The Court finds that the administrative code section that defendants claim forbids the imposition of liability against Crespo is irrelevant. This particular provision, NYC Admin. Code 22-1005, applies to Covid-related shutdowns of businesses after March 16, 2020. Defendants admit that they left the premises in August 2019. The fact that they would attempt to use a provision intended to alleviate harm imposed on struggling businesses due to Covid in this situation (where defendants left more than seven months prior) is reprehensible. How could an executive order signed months later have any bearing on a dispute that, according to defendants, was already over?

The Court also finds that the affirmative defenses and counterclaims should be severed and dismissed. However, defendants have raised legitimate issues with respect to the amount of damages to be awarded to plaintiff, including the damages sought related to the condition of the premises after defendants abandoned the property and the broker fees. Therefore, there shall be a hearing ascertain the total amount of damages to be awarded to plaintiff, including reasonable attorneys' fees.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted as to liability with respect to plaintiff's first, second, fourth and fifth causes of action and defendants' first and second counterclaims are

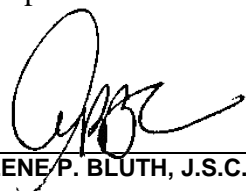
severed and dismissed, and there shall be a hearing to determine the amount of damages to be awarded to plaintiff; and it is further

ORDERED that the third cause of action is dismissed as plaintiff admitted it is moot (NYSCEF Doc. No. 55, n 2) and plaintiff shall file a note of issue on or before December 15, 2020; and it is further

ORDERED that the cross-motion by defendants is denied.

The clerk of this part shall schedule the hearing and inform the parties.

11/13/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

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