

77 Retail Holdings LLC v TSB 77 LLC

2021 NY Slip Op 30799(U)

February 11, 2021

Supreme Court, New York County

Docket Number: 650501/2020

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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INDEX NO. 650501/2020

77 RETAIL HOLDINGS LLC,
Plaintiff,

MOTION DATE 01/19/2021

- v -

MOTION SEQ. NO. 001

TSB 77 LLC, SEAN KIRSCHENBAUM, RICHARD
KIRSCHENBAUM, BLAKE KIRSCHENBAUM

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 58

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendants' motion seeking an Order pursuant to CPLR 3211(a)(7), dismissing with prejudice the Fourth Cause of Action of plaintiff 77 Retail Holdings LLC pursuant to CPLR §3212 and plaintiff's cross-motion seeking an Order granting plaintiff partial summary judgment on Plaintiff's first, second and third causes of action as against Defendants TSB 77 LLC and Sean Kirschenbaum, and setting the matter down for a hearing on attorneys' fees, is as follows:

Plaintiff commenced the instant action by filing a summons and complaint on January 22, 2020. Said complaint asserts causes of action for i) breach of lease; ii) attorney's fees; iii) guarantee and iv) alter-ego (corporate veil piercing) liability against the individual defendants based upon their failure to adhere to corporate formalities. On May 12, 2020, defendants interposed an answer.

Defendants seek dismissal of plaintiff's fourth cause of action, which seeks to hold the individually named defendants liable as directors of TSB 77 LLC, liable in their individual capacities for the company's alleged breaches of contract. As discussed in Art Capital Bermuda

Ltd. v. Bank of N.T. Butterfield & Son Ltd., 169 A.D.3d 426, 427 (1st Dep't 2019), in order to survive a motion to dismiss, plaintiff is required to allege particularized facts to warrant piercing the corporate veil." A review of plaintiff's complaint reveals that plaintiff's veil piercing claim consists solely of conclusory statements made upon information and belief which contain no specific facts. As such, defendants are entitled to dismissal of plaintiff's fourth cause of action. Plaintiff cross-moves for summary judgment on its first, second, and third causes of action. Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of Daniel Levy, a member of plaintiff, 77 Retail Holdings, LLC, together with the relevant leases, amendments, assignments,

personal guarantee and tenant ledger, which establish as follows: Plaintiff is the Landlord of the ground floor commercial space in the building known as and located at 201 East 77th Street, New York, New York 10075. Plaintiff's predecessor in interest, 201 East 77 Associates, entered into a written lease dated October 1, 2005 with non-party DJH Leather Corp. for use of the premises identified as stores 3 & 4 and the adjoining basement space located at 201 East 77th Street, New York, New York (the "Premises"), as amended by letter agreement dated October 1, 2012 and second amendment of lease dated August 30, 2018 (collectively the "Lease"). On or about August 5, 2019, DJH Leather Corp. assigned its rights and obligations under the Lease to TSB 77 LLC ("Tenant") by executing an instrument entitled "Assignment and Assumption of Lease and Amendment of Lease" (the "Assignment"). Tenant's principal, Sean Kirschenbaum ("Guarantor"), executed an absolute and unconditional guaranty of payment and performance in his individual capacity. Pursuant to the Assignment, Tenant agreed to pay Plaintiff \$ 180,000.00 per annum as "Fixed Rent", payable in equal monthly installments of \$15,000.00 on the first day of each month of the Lease's term, together with an 8% fee for any amounts not paid by the fifth day of the month. In August of 2019 Tenant entered into possession of the Premises, but has failed to pay the monthly rent except for a single \$15,000.00 payment made on November 15, 2019. As of September 8, 2020, Tenant owes Plaintiff \$195,000.00 in Fixed Rent, and an additional \$15,600.00 in Late Charges. In addition, plaintiff has established an entitlement to judgment against Sean Kirschenbaum in the amount of \$113,400.00, as limited by the May 26, 2020 amendment to the NYC Admin. Code, Section 22-1005, which restricts enforcement of personal guaranties for certain commercial establishments for the period of March 7, 2020 through September 30, 2020, an amount which is subject to increase if it is found that Sean Kirschenbaum does not qualify for said restriction. As such, plaintiff has established a *prima facie* entitlement to summary judgment

on its first, second, and third causes of action, which defendants have failed to oppose. As such it is hereby:

ORDERED that the plaintiff's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant, TSB 77 LLC in the amount of \$210,000.00, on plaintiff's first cause of action and against defendant, Sean Kirschenbaum in the amount of \$113,400.00 on plaintiff's third cause of action together with interest at the rate of 9% per annum from the date of August 1, 2019 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for summary judgment is granted on plaintiff's second cause of action seeking attorney's fees an assessment of damages against defendants TSB 77 LLC and Sean Kirschenbaum is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the defendant's motion to dismiss plaintiff's fourth cause of action is granted and the fourth cause of action is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint so as to replead the fourth cause of action within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

2/11/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE

