

**1296 Sheridan Ave. Hous. Dev. Fund Co. Inc.
v Qiao Jing Liu**

2021 NY Slip Op 33175(U)

November 10, 2021

Supreme Court, Bronx County

Docket Number: Index No. 805902/2021E

Judge: Kenneth L. Thompson Jr.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 _____ X

1296 SHERIDAN AVENUE HOUSING
DEVELOPMENT FUND COMPANY INC., A/A/O
1296 SHERIDAN ASSOCIATES, L.P.,

Index No: 805902/2021E

Plaintiff,

DECISION AND ORDER

-against-

Present:

QIAO JING LIU,

HON. KENNETH L. THOMPSON, JR.

Defendants.

_____ X

The following papers numbered 1 to read on this **motion to dismiss**

No	On Calendar of September 17, 2021	PAPERS
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----		motion sequence #1 NYSCEF
Answering Affidavit and Exhibits-----		motion sequence #1 NYSCEF
Replying Affidavit and Exhibits-----		motion sequence #1 NYSCEF
Memorandum of Law-----		motion sequence #1 NYSCEF

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3211(a)(1) & (7), to dismiss the complaint on grounds that the actions were suspended by Executive Order issued by Governor Cuomo and NYC Administrative Code, on grounds that plaintiff has no privity with the defendant and on grounds of impossibility. Plaintiff is the current owner of commercial property having purchased property by deed on June 26, 2018. Defendant became an assignee of a commercial lease on December 7, 2015 at the property plaintiff subsequently purchased. Defendant operated a Chinese restaurant in the leased premises.

Defendant argues that due to the COVID-19 pandemic, the payment of rent was forgiven under the doctrine of impossibility, was forgiven by Executive Order or Administrative Code and under the facts of this case, plaintiff is not in privity with defendant on the lease.

With respect to CPLR 3211(a)(7), “[o]n a motion to dismiss, the court is not



called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Rather, the complaint should be liberally construed in favor of the plaintiff (*see, Foley v. D'Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).” (*Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421-422 [1st Dept 2001]).

“Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see, e.g., Heaney v Purdy*, 29 NY2d 157).” (*Leon v Martinez*, 84 N.Y.2d 83, 88 [1994]).

With respect to impossibility, the First Department has rejected the affirmative defense of impossibility in the payment of commercial rent holding, “although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants' performance was not rendered impossible, by its reduced revenues.” (*558 Seventh Ave. Corp. v. Times Square Photo Inc.*, 194 A.D.3d 561, 561–62 [1st Dept 2021] *appeal dismissed*, 37 N.Y.3d 1040 [2021]). Defendant has failed to submit conclusive documentary evidence that the pandemic has made performance impossible.

With respect to defendant's argument that Governor Cuomo's Executive orders and the NYC Administrative Code "suspended and prohibited such actions like the instant case:"¹

New York City Administrative Code §22-1005 ("§22-1005"), also referred to as Local Law 55. Pursuant to §22-1005, commercial Landlords cannot seek monies for lease arrears from a non-tenant who personally guarantees a lease agreement on behalf of a business that meets the criteria as set forth in the provision. Specifically, this law refers to businesses that were forced to close as a result of the Executive Orders signed by Governor Cuomo.

However, this newly enacted provision protects only the guarantors of commercial leases and not the Tenant itself. While Governor Cuomo has signed executive orders that establish a moratorium on residential as well as commercial evictions and foreclosures, there is no law preventing a Landlord from seeking arrears from a commercial Tenant.

(267 Dev. Llc v. Brooklyn Babies & Toddlers Llc, 2021 NYLJ

LEXIS 229, 3-4).

Defendant herein is the direct tenant and not a guarantor on the lease assignment, and therefore, does not have a defense based upon the NYC Administrative Code §22-1005. With respect to privity on the subject lease and assignment of the lease to plaintiff, the plaintiff alleges the following in paragraph 11 of the complaint. "On or about June 28, 2018, 1296 Sheridan Avenue Housing Development Fund Company Inc. purchased the building in which the Premises is located from 1296 Sheridan Associates, L.P. along with all rights and obligations

¹ Affirmation in Reply, paragraph 6.

arising out of the aforementioned agreements.” The “aforementioned agreements” included the subject lease. Therefore, plaintiff has alleged privity with defendant under the lease. Additionally, plaintiff submitted the deed transferring the property to plaintiff.

Defendant has submitted neither documents conclusively establishing a defense to plaintiff’s claims nor dispositive argument that plaintiff has failed to state a cause of action.

Accordingly, defendant’s motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 11/10/2021



KENNETH L. THOMPSON JR. J.S.C.