

Ninth Ave. Realty LLC v Great Tasting 615, Inc.

2022 NY Slip Op 30820(U)

March 11, 2022

Supreme Court, New York County

Docket Number: Index No. 155699/2020

Judge: William Perry

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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. WILLIAM PERRY PART 23

Justice

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NINTH AVENUE REALTY LLC,

Plaintiff,

- v -

GREAT TASTING 615, INC. D/B/A SUSHIVA, LIN FANG,
ABC CORP., JOHN DOE, JANE DOE

Defendant.

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INDEX NO. 155699/2020
MOTION DATE 09/14/2021
MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff Ninth Avenue Realty LLC brings this action against its former commercial tenant, Great Tasting 615, Inc. (“Defendant”), and Fang Lin (“Fang”), the guarantor of the lease. Motion sequences 001, 002, and 003 are consolidated for disposition.

Background

Plaintiff is the owner of the building located at 615 Ninth Avenue, New York, NY 10036. Pursuant to an October 25, 2019 lease agreement, Plaintiff leased commercial space in the building to Defendant for the period of November 13, 2019 through October 31, 2029. Fang signed an absolute and unconditional guaranty of the lease. Defendant operated a sushi restaurant called Sushiva on the premises.

Plaintiff alleges that Defendant stopped paying rent in April 2020. (NYSCEF Doc No. 1, Complaint, at ¶ 17.) As a result, Plaintiff served Defendant with a notice of termination on June 30, 2020, stating that the lease would be terminated on July 19, 2020. (*Id.* at ¶¶ 17-18.) Plaintiff alleges that Defendant has remained in possession of the premises, an allegation which Defendants do not dispute.

At the time Plaintiff's commenced this action, on July 24, 2020, Plaintiff alleged that Defendant had failed to pay rent for the months of April, May, June, and July 2020, amounting to \$34,000.00 in rental arrears. (*Id.* at ¶ 20.) In addition, Plaintiff alleges that Defendant's default entitles it to rescind a rental credit it had granted Defendant for the eight months of October 2019 through May 2020, resulting in additional rental arrears of \$68,000.00. (*Id.* at ¶ 22, citing NYSCEF Doc No. 43, Lease, at 24.) Plaintiff also alleges that Defendant owes \$1,062.53 real estate taxes for July 2020, \$1,000.00 for violation from the Fire Department, and \$100.00 for violation from the Department of Sanitation (*id.* at ¶ 26), for a grand total of \$104,162.53.

Plaintiff sets forth the following causes of action in the complaint: 1) damages due through July 20, 2020 (i.e. the \$104,162.53 amount) plus 12% interest against Fang; 2) the remaining balance of the lease, \$2,185,524.00 plus 12% interest, against Fang; 3) ejectment of Defendant; 4) ejectment of Defendant; 5) use and occupancy against Defendant; 6) the remaining balance of the lease against Defendant; and 7) attorneys' fees against both Defendants.

In motion sequence 001, Defendants move to amend the answer to include an affirmative defense under New York City Administrative Code § 22-1005 (the "Guaranty Law"). This motion is unopposed.

In motion sequence 002, Fang moves to dismiss the first, second, and seventh causes of action as against her, pursuant to the Guaranty Law.

Plaintiff cross-moves for summary judgment against both Defendants on causes of action one through six in the amount of \$2,315,985.34 plus 12% interest from April 1, 2021, and seeks a judgment of possession of the premises and a writ of assistance. Plaintiff also moves for summary judgment on the seventh cause of action for attorneys' fees, to be determined at a later hearing.

In motion sequence 003, Defendants again move to amend the answer, to add the affirmative defense of the Guaranty Law, in addition to counterclaims for commercial tenant harassment, pursuant to NYC Admin. Code §§ 22-901, 902, and 903, and the affirmative defense of illegality of the lease's acceleration clause.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

The Guaranty Law prohibits the enforcement of personal guarantees for commercial tenants if the conditions of paragraphs 1 and 2, outlined below, are satisfied.

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
 - a. The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;
 - b. The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

c. The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

(NYC Admin. Code § 22-1005.)

Here, it is undisputed that Defendant operated a sushi restaurant at the premises and was thus required to cease operations, satisfying the conditions of the above paragraph 1. In addition, Plaintiff alleges that Defendant defaulted by failing to pay rent for the months of April, May, June, and July of 2020 (Complaint at ¶ 17), all of which are clearly within the time period contemplated by paragraph 2. The \$1,062.53 property tax charge also clearly falls within that time period. (NYSCEF Doc No. 47.) Thus, Fang's motion to dismiss count 1 is granted to the extent that she is not liable for Defendant's alleged rental arrears in the amount of \$102,000.00 or the \$1,062.53 property tax charge.

Fang is also not liable for the remaining \$2,185,524.00 of the lease as alleged in Plaintiff's second cause of action. Plaintiff bases this claim on the language of the guaranty, which states that Fang is liable for Defendant's obligations "through and including the date" that Defendant performs the following:

- (i) provide written notice to Landlord (pursuant to the notice requirements in the Lease) of Tenant's intention to vacate and surrender the Demised Premises to Landlord no less than six (6) months prior to the date prior to the date Tenant actually vacates and surrenders the Demised Premises;
- (ii) vacated and surrendered the Demised Premises to the Landlord pursuant to the terms of the Lease;
- (iii) delivered the keys to the Demised Premises to Landlord; and

(vi) paid to Landlord all Obligations to and including the date which is the later of (x) the actual receipt by Landlord of the Obligations, (y) the surrender of the Demised Premises, or (z) receipt by Landlord of the keys to the Demised Premises.

(NYSCEF Doc No. 30, Guaranty.) However, “[t]his court concludes that these terms merely state that the guarantee remains in effect until tenant has performed the listed acts. This provision does not establish that defendant is liable for rent for the remainder of the lease term if tenant fails to fulfill these requirements. Plaintiff did not point to any lease provision that establishes such liability, either.” (*45-47-49 Eighth Avenue LLC v Conti*, 72 Misc 3d 1210[A], at *7 [Sup Ct, NY County, July 23, 2021] [dismissing causes of action against individual guarantor where language of personal guaranty is identical to language here].) As such, the court finds that Fang has met her burden in establishing entitlement to dismissal of causes of action one, two, and seven.

In opposition, Plaintiff fails to raise a triable issue of material fact. In its cross-motion, Plaintiff seeks summary judgment for \$2,315,985.34 plus 12% interest in damages against Fang as guarantor. (NYSCEF Doc No. 37, Cross-motion.) Plaintiff claims that Defendant defaulted when it “failed to pay March 2020 rent by March 1, 2020.” (*Id.* at ¶ 8.) However, Plaintiff’s own evidence, a rent ledger, clearly shows that Defendant paid rent for March 2020. (NYSCEF Doc No. 45.)

Additionally, Plaintiff has not demonstrated that Fang is personally liable for either the \$1,000.00 FDNY violation or the \$100.00 Department of Sanitation violation. Plaintiff submits a February 18, 2020 notice of violation from the FDNY indicating that a hearing would be held regarding the violation on March 4, 2020, with \$1,000.00 being the maximum fine imposed, but that the violation could be corrected for no penalty. (NYSCEF Doc No. 48.) Similarly, the evidence submitted regarding the \$100.00 fine imposed by the Department of Sanitation is

addressed to Plaintiff, regards a “multiple dwelling” rather than a commercial property, and contemplates a hearing to be held on March 10, 2020. (NYSCEF Doc No. 49.) There is no evidence indicating that Defendant ever actually defaulted on these charges.

As outlined above, Plaintiff’s own evidence, i.e., the rent ledger, undermines its cross-motion for summary judgment against Defendant, as an issue of fact exists as to the amount of rent owed and the date of Defendant’s alleged default. Plaintiff’s cross-motion is denied in its entirety.

Finally, Defendant’s motion sequence 003 to amend the answer is granted. “Leave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay.” (*McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983].) Although Plaintiff alleges that it is prejudiced because “Defendants are moving to amend their answer after they moved for summary judgment” (NYSCEF Doc No. 64, MS003 Opposition, at ¶ 30), Defendants’ motion sequence 001 to amend the answer was filed prior to their motion to dismiss and the allegations of prejudice are unsubstantiated. Finally, Plaintiff’s argument that the proposed amendments are lacking in merit is unavailing, as further discovery is needed. (*See We Burn Food LLC v Bouley Test Kitchen 21 LLC*, 2021 WL 4776222 [Sup Ct, NY County, Sept 30, 2021] [holding that further discovery was needed to determine the merits of defendant’s claim of commercial tenant harassment under NYC Admin. Code § 22-902(a)(14)].) In light of the court’s granting motion sequence 003, motion sequence 001 is denied as moot. Thus, it is hereby

ORDERED that Defendants’ motion sequence 001 is denied as moot; and it is further

ORDERED that Defendant Fang Lin’s motion sequence 002 to dismiss the second and seventh causes of action is granted and the second and seventh causes of action are dismissed as against her in their entirety; and it is further

ORDERED that Defendant Fang Lin’s motion sequence 002 to dismiss the first cause of action is granted in part, to the extent that she is not liable for the alleged \$102,000.00 in rental arrears and \$1,062.53 real estate tax charge, as outlined above; and it is further

ORDERED that Defendant Fang Lin’s motion sequence 002 to dismiss the first cause of action is denied in part, to the extent that she seeks dismissal of the \$1,000.00 and \$100.00 violations as outlined above; and it is further

ORDERED that Plaintiff’s cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED that Defendants’ motion for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiff shall serve an answer to the amended answer or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court’s review and signature, within thirty (30) days.

3/11/22
DATE


WILLIAM PERRY, 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 type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE