

<b>Granito v Space 54 LLC</b>
2022 NY Slip Op 30821(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 158627/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

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INDEX NO. 158627/2020

BARRIE GRANITO,

MOTION DATE 08/12/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

SPACE 54 LLC, ELVIRA GRAU, JAMES GRAU, ANDREW ZANG

**DECISION + ORDER ON MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Barrie Granito brings this action for breach of contract against Defendants Space 54 LLC, an event venue, Elvira Grau, James Grau, and Andrew Zang, alleging that the Defendants failed to return the \$33,510.00 security deposit she had paid to use the venue for her son’s bar mitzvah. In motion sequence 001, Plaintiff moves for summary judgment. Defendants cross-move for default judgment on their counterclaim that Plaintiff breached the contract by failing to pay the final \$12,490.00 installment payment, and to dismiss the claims against the individual Defendants as Plaintiff cannot pierce the corporate veil. Plaintiff “cross-cross moves” to compel Defendants to accept the filing of her late reply.

**Background**

The bar mitzvah, as memorialized in a June 20, 2019 contract (NYSCEF Doc No. 34, Contract), was scheduled to take place on May 15, 2020, but was rescheduled to October 23, 2020 due to COVID restrictions. The bar mitzvah, however, was never held on the rescheduled date. Plaintiff alleges that this was because the same COVID restrictions prevented Defendants from

holding the event, while Defendants allege that Plaintiff unilaterally canceled the contract “because of her own financial situation.” (NYSCEF Doc No. 33, Elvira Affidavit, at ¶ 13.)

Plaintiff alleges that Space 54 is an alter ego of the individual Defendants and sets forth causes of action against all Defendants for breach of contract, breach of implied warranty of good faith and fair dealing, rescission, and unjust enrichment. (NYSCEF Doc No. 1, Complaint.) Plaintiff seeks the return of \$33,510.00 she paid in installments as a security deposit. The cost for the event pursuant to the contract was \$40,000.00, plus a 15% service charge (\$6,000.00), for a grand total of \$46,000.00.

Defendants answered and set forth a counterclaim alleging that Plaintiff owes \$12,490.00, the remainder of the contract. (NYSCEF Doc No. 6, Answer, at ¶¶ 103-112.)

After Plaintiff moved for summary judgment (NYSCEF Doc No. 24, Pl.’s Memo), Defendants cross-moved for default judgment on the counterclaim based on Plaintiff’s failure to file a reply thereto. (NYSCEF Doc No. 36, Cross-motion.) Defendants also argue that Plaintiff’s failure to file a reply to the counterclaim renders her motion for summary judgment premature, as issue has not been joined. (*Id.* at 5.) The individual Defendants also argue that Plaintiff fails to submit evidence sufficient to pierce the corporate veil.

Plaintiff filed a late reply to the counterclaim (NYSCEF Doc No. 38), which was rejected by Defendants as untimely. (NYSCEF Doc No. 39.) Plaintiff then “cross-cross moved” to compel Defendants to accept the late reply to the counterclaim. (NYSCEF Doc No. 41.)

### **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].)

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 [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 [2012].) Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].)

To set forth a claim for breach of contract, a party must establish “(1) the existence of a contract; (2) the party's own performance under the contract; (3) the other party's breach of the contract; and (4) resulting damages.” (*Sanders v Edison Ballroom LLC*, 2021 WL 1089938, at \*2 [Sup Ct, NY County, Mar 22, 2021].) Here, the contract provides that:

[I]f SPACE 54 fails to comply with this contract due to any event or act outside and beyond the scope of SPACE 54's control, SPACE 54's liability shall be limited solely to a refund of the deposit money paid by you and SPACE 54 shall have no further liability to you. SPACE 54 will have no liability whatsoever for failure to supply any service when prevented from doing so by strike, flood, fire, earthquake, severe weather event, labor dispute, accident, power failure, illness or any cause beyond the reasonable control of SPACE 54 or force majeure or act of God or by orders or regulations of any governmental authority including the right of eminent domain proceedings or failure of any equipment, fuel, water, gas, electrical supply, heat, air conditioning equipment, structural integrity of the building, parking problems or any other facility condition, nor will same constitute a breach of this contract by SPACE 54.

(NYSCEF Doc No. 34, Contract, at 3.)

Plaintiff has met her burden for summary judgment against Space 54, as she has established the existence of a contract, her own performance in paying the security deposit, Space 54's breach of the contract by failing to refund Plaintiff pursuant to the above force majeure clause, and resulting damages. (*Sanders*, 2021 WL 1089938, at \*2 [granting summary judgment to plaintiff seeking return of security deposit for event canceled due to COVID].)

Defendants fail to raise an issue of fact. In opposition, Defendant Elvira Grau submits an affidavit, alleging that Plaintiff canceled the contract over the phone because of her own financial situation. The affidavit is unsupported by evidence and thus insufficient to establish the existence of a triable issue of fact. (*Zuckerman*, 49 NY2d at 560.)

Plaintiff's claim for piercing corporate veils also fails. Plaintiff failed to allege that the abuse of the corporate form was for the purpose of defrauding Plaintiff. The complaint is devoid of allegations to support a claim for piercing the corporate veil, i.e., disregard of corporate formalities, ownership overlap, common office space, etc. (see *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174, 970 N.Y.S.2d 178 [1st Dept 2013]). Accordingly, summary judgment is granted as to the individual defendants.

Defendants' cross-motion is denied, as the contract was canceled and thus, Plaintiff had no obligation to provide further payment. (See *Lord v Limited Liability Company*, 71 Misc 3d 1228[A] [Sup Ct, Westchester County 2021]; *Nelkin v Wedding Barn at Lakota's Farm, LLC*, 152 NYS3d 216, 223 [Civ Ct, Queens County 2020].) Defendants' contention that Plaintiff failed to file a reply to the counterclaim is likewise unavailing, as Plaintiff discussed the counterclaim in her motion for summary judgment (NYSCEF Doc No. 24 at ¶¶ 14, 23; see *286 Clinton LLC v Lazarre*, 18 Misc 3d 1101[A], at \*2 [Civ Ct, Kings County 2007] ["the court can deem a reply to a counterclaim interposed where the opposition to a motion for judgment on the counterclaim


contains within it the content of a reply, though not labeled as such, and the court need not require an additional motion for leave to amend the pleadings especially where such leave would be freely given absent prejudice. The liberal pleading requirements set forth in CPLR § 3025(b) contemplate such a result.”].) Moreover, Defendants fail to demonstrate prejudice as the counterclaim is directly related to the contract at issue. Thus, it is hereby

ORDERED that Plaintiff’s motion sequence 001 for summary judgment is granted to the extent of granting partial summary judgment in favor of Plaintiff and against Defendant Space 54 LLC on the first cause of action; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Plaintiff and against Defendant Space 54 LLC in the amount of \$33,510.00, plus interest at the statutory rate from October 15, 2020 until the date of the decision on this motion, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Defendants’ cross-motion is granted in part and all claims against the individual Defendants, Elvira Grau, James Grau, and Andrew Zang are dismissed and the Defendants’ cross-motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

<u>3/11/2022</u> DATE	 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT