

301 E. 78 St. Corp. v Iken-Murphy

2022 NY Slip Op 31869(U)

June 14, 2022

Supreme Court, New York County

Docket Number: Index No. 159256/2021

Judge: Frank P. Nervo

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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. FRANK NERVO PART 04

Justice

-----X

301 E. 78 ST. CORP.

Plaintiff,

- v -

MONIKA IKEN-MURPHY,

Defendant.

-----X

INDEX NO. 159256/2021

MOTION DATE 10/08/2021

MOTION SEQ. NO. 001

**AMENDED DECISION +
ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

The Court amends its decision under NYSCEF Doc. No. 36 to correct a typographical error on the final page. Upon amendment, the Court issues the below decision and order.

Plaintiff landlord moves for summary judgment in lieu of complaint against defendant guarantor, pursuant to a commercial lease guaranty agreement. Defendant opposes contending that plaintiff concealed defects with the property, including a lack of certificate of occupancy for type of business utilizing the commercial space and defects preventing the issuances of same.

CPLR § 3213 provides that where an action for money damages only is based upon an instrument, the plaintiff may seek summary judgment in lieu of filing a complaint. “[A] document comes within CPLR 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms;” however, “[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document” (*Weissman v. Sinorm Deli*, 88 NY2d 437, 444 [1996]; see also *PDL Biopharma, Inc. v. Wohlstadter*, 147 AD3d 494 [1st Dept 2017]). A plaintiff must, therefore, establish the instrument is for the payment of money only, the promise to pay is unconditional, and defendant failed to make payments as required by the instrument (*id.*; *DDS Partners, LLC v. Celenza*, 6 AD3d 347 [1st Dept 2004]). If established, the burden shifts to defendant to prove the existence of a triable issue of fact via evidentiary proof, mere conclusory denials are insufficient (*Cooperative Centrale Raiffeisen-Borrenleenbank, B.A. “Rabobank Intl.” New York Branch v. Navarro*, 25 NY3d 485 [2015]; see also *Banco Popular N. Am v. Victory Taxi Mgt.*, 1 NY3d 381 [2004]).

As relevant here, defendant guarantor operated a pre-school education facility in the commercial space at issue. Defendant executed a lease on behalf

of the pre-school facility with plaintiff landlord, as well as a personal guarantee. Thereafter, the pre-school facility ceased paying rent, and plaintiff brought the instant motion for summary judgment in lieu of complaint as against defendant guarantor for payment of rent and additional rent.

The personal guarantee agreement provides that defendant shall pay rent and additional rent which the pre-school facility has failed to pay. Contrary to defendant's contention, it does not require that defendant assume all obligations of the pre-school facility or any assignee under the lease. Accordingly, the guarantee is an agreement for the payment of money only, and such claim is established by the face of the agreement, lease, and simple proof of nonpayment. Of note, consistent with NYC Administrative Code § 22-1005,¹ plaintiff has not sought to recover rent and additional rent for the period of March 7, 2020 through June 30, 2021. NYC Administrative Code § 22-1005 provides:

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant

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under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 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).

The burden thus shifts to defendant to prove the existence of a triable issue of fact. To the extent that defendant contends plaintiff's building violations prohibited the pre-school facility from securing an appropriate permanent certificate of occupancy, it is undisputed that the pre-school facility

engaged an architect to retrofit the commercial space for its use and was issued three temporary certificates of occupancy. Likewise, it is undisputed that a permanent certificate of occupancy for this use type was never issued. While defendant contends that violations issued by the Department of Buildings prohibited the issuance of a permanent certificate of occupancy, the lease specifically provides that defendant took possession of the premises subject to any violations and that landlord made no guarantee that the intended business was lawful or permissible under the certificate of occupancy (*see e.g.* NYSCEF Doc. No. 12 at ¶ 15, 41, 44, and 61). Equally, to the extent that defendant contends plaintiff concealed the certificate of occupancy, the lease agreement unequivocally places the burden of securing a certificate of occupancy upon the commercial lessee (*id.*). Consequently, defendant has failed to raise any triable issue of fact or proof of payment under the terms of the lease and guarantee sufficient to defeat the summary judgment motion.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED and ADJUDGED that plaintiff 301 E. 78 ST. CORP does recover from defendant MONIKA IKEN-MURPHY the amount of \$180,270.96

plus interest at the rate of 9% per annum from the date of July 1, 2021, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the plaintiff has execution therefor; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT.

6/14/2022
DATE

CHECK ONE:

| | | | |
|-------------------------------------|----------------------------|--------------------------|--------|
| <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED |
| <input checked="" type="checkbox"/> | GRANTED | | |
| <input type="checkbox"/> | SETTLE ORDER | | |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | |

APPLICATION:

CHECK IF APPROPRIATE:

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| <input type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | J.S.C. |
| <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| <input type="checkbox"/> | SUBMIT ORDER | | |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |


HON. FRANK P. NERVO