

**Carnegie Hall Tower II L.L.C. v Yes Food LLC**

2022 NY Slip Op 32129(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 652678/2019

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

-----X

CARNEGIE HALL TOWER II L.L.C.,  
Plaintiff,

- v -

YES FOOD LLC, YANNA SLAVUTSKY, VLADIMIR  
SLAVUTSKY, and ELIZABETH SLAVUTSKY,

Defendants.

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INDEX NO. 652678/2019

MOTION DATE 08/06/2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is hereby ordered that plaintiff’s motion for summary judgment pursuant to CPLR 3212 is granted, without opposition, based upon the following memorandum decision.

**Background**

In this action for breach of a commercial lease, plaintiff Carnegie Hall Tower II, LLC (“Landlord”), asserts a cause of action for breach of lease (first cause of action) against defendant Yes Food, LLC (“Tenant”), and a cause of action for breach of guaranty (second cause of action) against defendants Yanna Slavutsky, Vladimir Slavutsky, and Elizabeth Slavutsky (“Guarantors”). Plaintiff now seeks summary judgment on its complaint.

Pursuant to a lease dated November 28, 2008, Landlord leased to Tenant a portion of the ground floor of the building located at 152 West 57<sup>th</sup> Street, New York, New York, a/k/a Carnegie Hall Tower (the “Premises”) (NYSCEF Doc. No. 27 ¶ 2). Tenant was to use the Premises as “an upscale, first class, high-quality café serving gourmet coffee and espresso-based

drinks, teas and other non-alcoholic beverages and homemade gourmet food for on and off the premises consumption” (*id.*, ¶ 3).

The lease term commenced on January 1, 2009 (the “Commencement Date”), and was to terminate on December 31, 2018 (the “Expiration Date”) (*id.*, ¶ 2). The fixed monthly rent during the time relevant to this action was \$7,364.45 (NYSCEF Doc. No. 27 § B.2). In addition, Tenant agreed to pay additional rent for all water charges, monthly real-estate taxes, and legal fees incurred by Landlord should it commence an action against Tenant for default (NYSCEF Doc. No. 36 ¶ 8). If Tenant failed to pay either the fixed rent or additional rent when due, the Guarantors “jointly and severally, and unconditionally and irrevocably guarantee[d] to [Landlord] the full and prompt payment of all Base Rent (as defined in the Lease) and all Additional Rent (as defined in the Lease)” (the “Guaranty”) (NYSCEF Doc. No. 28 ¶ 1). Tenant ceased paying its lease obligations as of July 1, 2018 (NYSCEF Doc. No. 31 [the resident ledger]). Tenant then surrendered the Premises on September 7, 2018 (the “Vacate Date”), which remained vacant through the Expiration Date (NYSCEF Doc. No. 45 ¶¶ 19-21).

At the time it commenced this action, Landlord alleged that – after the application of Tenant’s security deposit – Tenant owed outstanding rent of \$36,822.25 for the months of August 2018 through December 2018 (NYSCEF Doc. No. 36 ¶ 15). Further, that Tenant owed additional rent of \$21,236.07 for unpaid real-estate charges, \$5,566.55 for water charges, and \$2,923.11 for legal fees incurred by Landlord in a proceeding against Tenant for nonpayment, totaling \$66,547.98, plus interest from July 1, 2018 (*id.*, ¶¶ 17-19). Landlord further alleged that, per the Guaranty, the Guarantors owed \$66,547.98 plus interest from July 1, 2018, on account of Tenant’s breach of the lease.

In support of its motion, Landlord offers the lease, its resident ledger for Tenant, and the affidavit of its senior vice president to state that the total outstanding amount is now \$59,670.32 plus interest from July 1, 2018 – after the application of Tenant’s security deposit – for \$44,186.70 in rent, \$21,655.44 in additional rent for real-estate taxes, \$265.21 in additional rent for water charges, and \$2,923.11 in legal fees incurred by Landlord in a housing court proceeding resolved by stipulation (the “Stipulation”) against Tenant (*see*, NYSCEF Doc. No. 45 ¶¶ 22-25, 30; NYSCEF Doc. No. 30). The affidavit also states that per the Guaranty, the Guarantors are personally liable for all rent and additional rent incurred by Tenant through the Vacate Date, totaling \$34,674.44 plus interest from July 1, 2018 (NYSCEF Doc. No. 45 ¶ 30).

Landlord commenced this action by filing a summons and complaint on May 6, 2019 (NYSCEF Doc. No. 36). Tenant and the Guarantors appeared and answered the complaint (NYSCEF Doc. No. 38). Landlord now makes the instant motion for summary judgment, which the court notes was unopposed by Tenant and the Guarantors.

#### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]).

### Discussion

To bring a breach of contract action, a plaintiff must allege “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, Landlord has established a *prima facie* case for breach of contract by submission of the lease, Landlord’s resident ledger for Tenant, and the affidavit of its senior vice president, which together establish that Landlord and Tenant had a contract, that Landlord performed thereunder, that Tenant has breached the lease by not paying fixed and additional rent, and that Landlord has been damaged by such breach (NYSCEF Doc. Nos. 27, 31, 45).

In opposition, Tenant and the Guarantors raise seven affirmative defenses in their answer to the complaint; to wit, that Landlord failed to serve two of the three Guarantors, Yanna Slavutsky and Vladimir Slavutsky; that Landlord failed to state a cause of action upon which relief can be granted; that the amount claimed by Landlord as outstanding is in dispute; that Landlord failed to comply with the condition precedent for items sought for additional rent; that Tenant surrendered the Premises and Landlord accepted it; collateral estoppel; and that Landlord failed to mitigate damages (NYSCEF Doc. No. 5 ¶¶ 5-15). As the court previously noted, however, Tenant and the Guarantors failed to oppose Landlord’s motion for summary judgment, and “where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do” (*Zuckerman*, 49 NY2d at 560). By raising affirmative defenses without submitting any evidence to support them, nor putting forward an excuse for their failure to do so, Tenant and the Guarantors failed to meet their burden for opposing Landlord’s motion (*Nationstar Mortg., LLC*

*v Silveri*, 126 AD3d 864, 865 [2d Dept 2015] [“Since no opposition was filed, no triable issue of fact was raised in response to the plaintiff’s prima facie showing or as to the merits of any of Silveri’s affirmative defenses”]).

Further, and with respect to the affirmative defense of collateral estoppel, “[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling” (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001] [internal citations omitted], *cert denied sub nom Bain v Gilfillan*, 535 US 1096 [2002]). Additionally, “[t]he litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party,” while “[t]he party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination” (*id.* at 304).

Here, Landlord submitted the Stipulation – dated June 12, 2018 – which Tenant was a party to (NYSCEF Doc. No. 30). The Stipulation sets forth that Tenant “acknowledged owing \$63,672.22 through June 12, 2018” (*id.*) In the current action, Landlord is only seeking outstanding rent, additional rent, and legal fees under the lease from July 1, 2018, and onward (NYSCEF Doc. No. 31; NYSCEF Doc. No. 45 ¶¶ 20-25). Consequently, that stipulation does not begin to address arrears accruing subsequent the stipulation date – June 12, 2018. Any arrears accruing after that point in time cannot possibly be estopped by virtue of that stipulation. Furthermore, the Guarantors were not parties to the Stipulation. Therefore, Tenant and the Guarantors cannot invoke the defense of collateral estoppel.

Finally, regarding breach of guaranty, “[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the

underlying debt, and the guarantor's failure to perform under the guaranty” (*City of N.Y. v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1998] [internal citations omitted]). Here, Landlord has established a *prima facie* case on its motion for summary judgment to enforce a written guaranty by submission of the Guaranty, the resident ledger for Tenant, and the affidavit of Landlord’s senior vice president. Together, these establish that the Guarantors made an unconditional guaranty to Landlord, that there was underlying debt due to Tenant not meeting its obligations under the lease, and that the Guarantors failed to perform under the Guaranty.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted; and it is, therefore,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Carnegie Hall Tower II, LLC and against defendant Yes Food, LLC, in the principal sum of \$59,670.32, with interest accruing thereon at the statutory rate from July 1, 2018, and 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, of the foregoing principal sum of \$59,670.32, the Clerk of the Court is directed to enter judgment in favor of plaintiff Carnegie Hall Tower II, LLC and against defendants Yanna Slavutsky, Vladimir Slavutsky, and Elizabeth Slavutsky, jointly and severally with defendant Yes Food, LLC, in the principal sum of \$34,674.44, with interest accruing thereon at the statutory rate from July 1, 2018, and as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

*Louis L. Nock*

<u>7/1/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE