

<b>Avamer 57 Fee LLC v Gorgeous Bride, Inc.</b>
2022 NY Slip Op 32605(U)
July 26, 2022
Supreme Court, New York County
Docket Number: Index No. 655648/2021
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

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INDEX NO. 655648/2021

AVAMER 57 FEE LLC,

MOTION DATE 07/20/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

GORGEOUS BRIDE, INC., GABRIEL SHIMUNOV

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 were read on this motion to/for JUDGMENT - SUMMARY.

**BACKGROUND**

Plaintiff commenced this action seeking a judgment for rent and additional rent against Gorgeous Bride, Inc. (Tenant) and Gabriel Shimunov (Guarantor) (collectively Defendants) pursuant to the lease agreement and guaranty for a portion of the 11th floor at 57 West 57th Street, New York, New York. Defendants have counterclaimed for harassment.

On March 15, 2022, plaintiff moved for summary judgment and dismissal of defendants' defenses and counterclaims.

On May 2, 2022, the Court granted the motion in part, dismissing the first, second, third and fifth affirmative defenses, as well as the first counterclaim. The balance of the motion for summary judgment was denied, as the motion was defective in failing to submit a statement of material facts

**PENDING MOTION**

On June 8, 2022, Plaintiff moved a second time for summary judgment. On July 20, 2022 the motion was fully briefed and submitted to this court for determination.

## DISCUSSION

### *Plaintiff's motion for summary judgment is granted in part*

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]).

“On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477, 478 [1st Dept 2009]; see also *Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003] [“The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

This is Plaintiff's second motion for summary judgment. The first motion was denied, not on the merits, but because the motion was procedurally defective in that it failed to contain a Statement of Facts. Although successive motions for summary judgment are not favored by the

courts, a subsequent summary judgment motion may be properly entertained when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts (*Aurora Loan Servs., LLC v Yogev*, 194 A.D.3d 996, 144 N.Y.S.3d 604 [2nd Dep't. 2021]).

Plaintiff commenced this action for breach of contract and to enforce the guaranty based upon the allegation that Defendants have failed to pay rent due for the Subject Premises in accordance with the lease.

To prevail on a breach of contract action, Plaintiff must establish the existence of a valid contract, performance of the obligations under the contract, and a defendant's breach and resulting damages. *Morris v. 702 East Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

Here, there is no dispute that a contract exists between the parties in the form of a lease. Defendants do not dispute that they have failed to pay rent since April 2020. In opposition, Defendants only argue that Plaintiff is not entitled to seek monies due for additional rent, specifically real estate tax and utilities, as Defendants assert Plaintiffs have failed to abide by a condition precedent and serve Defendants with notice of these amounts due.

According to the rent ledger submitted in support of the instant motion, Defendants owe \$114,798.39 in rent from April 2020 through and including January 2022<sup>1</sup>. Although Plaintiff submits in support documents establishing real estate escalation calculation and utility escalation calculation, there is no evidence presented to prove that Defendant was provided with notices, as required under the lease, for these items of additional rent.

Based on the forgoing, Plaintiffs have established entitlement to partial summary judgment on the claim for breach of contract, for base rent due from April 2020 to and including

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<sup>1</sup> This amount includes a \$6500 credit to Defendants as referenced in the ledger

January 2022, as against defendant Gorgeous Bride, Inc. Plaintiff has further established entitlement to partial summary judgment as against the defendant Guarantor, Gabriel Shimunov, in the amount of \$32,673.54<sup>2</sup>, representing rent arrears from July 2021 through and including January 2022, the period of time for which the Guarantor is liable.

Plaintiff has failed to establish a cause of action for the additional rent, specifically real estate and utility charges, claimed due against either Defendant.

Plaintiff's cause of action for legal fees is denied without prejudice, as Plaintiff has failed to submit any documentation to support an award for the same.

***Defendants' second counterclaim for harassment is dismissed***

Defendants' second counterclaim for harassment is dismissed. New York City Administrative Code § 22-902 provides, in pertinent part:

- (a) A landlord shall not engage in commercial tenant harassment. Except as provided in subdivision b of this section, commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property, and (ii) includes one or more of the following: (14) attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code.

New York City Administrative Code § 22-1005, which became effective on May 26, 2020, provides, in pertinent part, “ provision[s] in a commercial lease or other rental agreement involving real property located within the city that provide for natural persons who are not the tenant to become personally liable for certain debts are unenforceable if ... (ii) the default or other event causing personal liability occurred between March 7, 2020 and September 30, 2020.” The time period was extended ultimately to include defaults through June 30, 2021.

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<sup>2</sup> This amount includes a \$6500 credit to Defendants as referenced in the ledger

In this action, Plaintiff is seeking from the Guarantor only the rent due from July 2021 through and including January 2022. The harassment Defendants alleges stems from the prior action under index 650832/2021 (Prior Action), wherein Plaintiff sought rent and additional rent from the Defendants for the period of April 2020 through and including February 2021.

In the Prior Action the summons and complaint were filed on February 5, 2021. On April 30, 2021, Plaintiff moved for a default judgment as against Defendants. On June 4, 2021, Defendants crossed moved, seeking an extension of time to file an answer, which included a counterclaim for harassment under New York City Administrative Code § 22-902. The action was discontinued by Plaintiff on June 28, 2021.

In order to prevail on a claim for harassment under § 22-902, Defendants must establish that Plaintiff knew or should have known at the time that the action was filed the guarantee was unenforceable. Other than a statement by Defendants that Plaintiff knew the guarantee was unenforceable, Defendants provide no other evidence of the same. Whereas, Plaintiff discontinued the prior action within a short time of receiving Defendant' proposed answer including a counterclaim of harassment, weakens Defendants' contention that Plaintiff knew at the time of filing the prior action the guarantee was unenforceable.

In a similar action, *45-47-49 Eighth Avenue LLC v Conti*, 72 Misc3d 1210(A), (Sup. Ct. NY County 2021), the court dismissed Defendants' counterclaim for harassment, finding,

As to the knowledge required under § 22-902 (a) (14), defendant claims that plaintiff knew or should have known that the guarantee is unenforceable but fails to present any evidence for this claim. In addition, after plaintiff brought this action, the City Council deemed it necessary to amend § 22-1005 to clarify that the statute also covers personal guarantee provisions "relating to" commercial leases. (*See* Local Law No. 98 (2020) of City of NY § 1, Declaration of Legislative Intent and Findings at ¶ 11.) This clarification undermines defendant's suggestion that plaintiff should have known the guarantee was unenforceable when it filed suit.

As the executive orders and codes have consistently changed during the course of the pandemic, and at times, as pointed out by the court in *45-47-49 Eighth Avenue, supra*, the legislature had to clarify portions of the newly enacted laws, and considering that Plaintiff immediately discontinued the prior action once the proposed amended answer was received, the court finds Defendants have failed to establish a claim for harassment.

### CONCLUSION

Wherefore, it is hereby

ORDERED that Plaintiff' motion for summary judgment is granted in part; and it is further

ORDERED hat Defendants' counterclaim for harassment is dismissed; and it is further

ORDERED that Plaintiff is awarded a judgment as against GORGEIOUS BRIDE, INC. in the amount of \$114,798.39, with interest at the statutory rate from September 24, 2021 until entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that Plaintiff is awarded a judgment as against GABRIEL SHIMUNOV, as guarantor, in the amount of \$32,673.54, with interest at the statutory rate from September 24, 2021 until entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

7/26/2022  
DATE

  
SABRINA KRAUS, 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"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE