

**128 Second Realty LLC v Toscana Pizza Inc.**

2022 NY Slip Op 32672(U)

August 4, 2022

Supreme Court, New York County

Docket Number: Index No. 654541/2020

Judge: Arlene Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

-----X

128 SECOND REALTY LLC, STELLAR 128 SECOND LLC,

Plaintiffs,

- v -

TOSCANA PIZZA INC. D/B/A NOLITA PIZZA, IVAN  
HERNANDEZ RODRIGUEZ, TONIN KERAJ, DRITAN  
SALIHAIJ, XYZ CORPORATIONS

Defendant.

-----X

**INDEX NO.** 654541/2020

**MOTION DATE** N/A

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for DISCOVERY.

The motion by plaintiffs to hold defendants in contempt is denied.

**Background**

Defendant Toscana Pizza Inc. d/b/a Nolita Pizza (the “Tenant”) entered into a lease with plaintiffs for a commercial space. Plaintiffs contend that the Tenant defaulted under the terms of the lease by not paying rent starting in March 2020 and that the Tenant abandoned the premises. They argue that defendants operated Nolita Pizza and signed a ten-year lease on May 28, 2019 and executed personal guarantees although plaintiffs contend that they are not seeking to enforce the personal guarantees. Plaintiffs point out that the lease contained a “no abatement” clause in which defendants expressly disclaimed a force-majeure protection that might excuse it from paying rent.

Plaintiffs maintain that defendants transferred its business and its assets to a new location just a few blocks away. They argue that this new location has the same trade name, owners, and

employees as the restaurant they operated in the premises owned by plaintiffs. Plaintiffs bring four causes of action arising out the breach of lease and relating to the purported fraudulent transfer of assets to the new restaurant. The allegations against the individual plaintiffs relate to a corporate veil piercing theory of recovery (again, not on the guarantees).

The Court previously granted judgment on plaintiffs' first cause of action against the Tenant arising out of the breach of lease. The remaining issues in this case involve plaintiffs' assertion that defendants fraudulently transferred assets to a new location. In this motion, plaintiffs seek to hold defendants in contempt for failure to sufficiently respond to plaintiffs' discovery demands. Specifically, plaintiffs complain that they have only received 65 pages of documents from defendants, including a one-page certificate of incorporation from the Tenant, 2020 state and federal tax returns for the Tenant, a promissory note from JPMorgan Chase Bank relating to a loan the Tenant received in April 2020 and three pages of financial records from the Tenant. They claim they want information about the financial affairs of defendants throughout the relevant time period, defendants' lease for the other location, and documents showing how defendants used the assets of the Tenant.

In opposition, defendants contend that they have produced all of the documents they possess. They acknowledge that they were supposed to submit a Jackson affidavit by June 2, 2022 (as ordered by the Court) but that counsel for defendants miscalendared the deadline and the Jackson affidavit was not signed until August 1, 2022 (*see* NYSCEF Doc. No. 95 [the Jackson affidavit]). Defendants also contest service of the order to show cause, which required that defendants be served by personal in hand service. They point out that some of the affidavits of service expressly acknowledge that service was not effectuated.

Defendants attach to their opposition the lease to the other business location (located on Kenmare Street) and they point out it was dated prior in time to the lease for the premises that is at issue in this case.

### **Discussion**

As an initial matter, the Court declines to hold defendants in contempt. Plaintiffs did not properly effectuate service on all defendants as required in the signed order to show cause and, even if they did, the circumstances here do not warrant holding defendants in contempt. While missing the Court's deadline for the Jackson affidavit is a sloppy mistake, the fact is that the record before this Court shows that defendants swear that they have produced all of the documents they possess.

The Jackson affidavit satisfied defendants' obligations with respect to plaintiffs' discovery demands. Defendant Salihaj explains where he looked for records and that he is the President of the Tenant (NYSCEF Doc. No. 95). Although plaintiffs suspect that there are more documents that exist, the Court cannot force defendants to produce documents that defendants swear do not exist. Plaintiffs are free to seek documents from third parties, if applicable.


The very nature of plaintiffs' theory of the case admittedly makes this discovery process difficult. Plaintiffs contend that defendants fraudulently transferred assets from one pizza shop to another. Defendants have turned over tax returns for 2020, some financial records from the Tenant as well as information about an April 2020 loan from JPMorgan Chase Bank. It may be that there are, as defendants insist, no documents showing a fraudulent transfer of assets to the new pizza shop because there were no transfers. Defendants stress that the lease for the new shop is dated prior to the lease for the shop at issue here, thereby contradicting plaintiffs' claim

that defendants simply moved to a nearby location as part of an effort to avoid the Tenant’s obligations under the lease at issue here.

At this point, the Court finds that holding depositions (and post EBT discovery demands) will prove more productive to explore whether or not defendants attempted to move assets to the other pizza shop. Depositions of all parties must occur on or before September 30, 2022. There is already a conference scheduled for November 1, 2022 and the parties must upload a discovery update by October 25, 2022.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs to hold defendants in contempt is denied.

<u>8/4/2022</u> <b>DATE</b>			 <hr/> <b>ARLENE BLUTH, J.S.C.</b>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE