Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc.
2022 NY Slip Op 33405(U)
October 5, 2022
Supreme Court, New York County
Docket Number: Index No. 655100/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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DAPER REALTY, INC.,

Plaintiff,

- v -

AL HORNO LEAN MEXICAN 57, INC., and XYZ CORP.,

Defendants.

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INDEX NO. 655100/2021

MOTION DATE 02/24/2022

MOTION SEQ. NO. 001

DECISION, ORDER + JUDGMENT ON MOTION

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 44
were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action seeking, *inter alia*, an order of ejectment and to recover unpaid rent arrears and holdover rent due under a commercial lease, the plaintiff landlord, Daper Realty, Inc. (the plaintiff), moves (1) pursuant to CPLR 3212 for summary judgment on the complaint, (2) pursuant to CPLR 3211(b) to strike the affirmative defenses of the defendant tenant, Al Horno Lean Mexican 57, Inc. (the defendant), (3) for an award of monthly use and occupancy, *pendente lite*, (4) to consolidate this action with a related action, captioned Daper Realty, Inc. v Christopher Pizzimenti a/k/a Chris Pizzimenti, Index No. 155325/2020, and (5) for a hearing to determine that the defendant's hardship declaration dated April 30, 2021, is invalid. The defendant opposes the motion and cross-moves to dismiss the complaint on the ground that the plaintiff is a foreign business not authorized to bring an action under Business Corporation Law (BCL) § 1312(a). The plaintiff opposes the cross-motion. For the following reasons, the plaintiff's motion is granted in part, and the defendant's cross-motion is denied.

II. BACKGROUND

The plaintiff, a Nevada corporation whose principal place of business is in California, is the owner of real property located at 1089 Second Avenue in Manhattan (the premises). The defendant, a New York corporation, is the operator of a take-out restaurant at the premises known as "Al Horno Lean Mexican Kitchen." The fictitious defendant, XYZ Corp., is alleged by the plaintiff to be an unknown undertenant that may be in possession of the premises with the defendant's consent but without the knowledge or consent of the plaintiff.

The premises were leased by the plaintiff to the defendant pursuant to a written lease agreement dated September 9, 2014 (the lease), for a ten-year term commencing on September 11, 2014, and expiring on September 30, 2024. The lease provides, *inter alia*, that the defendant is to pay base rent and additional rent to the plaintiff on a monthly basis. Article 74 of the lease provides, in relevant part, that in the event of the defendant's default in fulfilling its obligation to pay rent or additional rent, the plaintiff may serve a notice of default allowing the defendant five days to cure its default. If the defendant fails to cure after the expiration of such five-day period, the plaintiff may terminate the lease upon three days' notice by serving a written notice of cancellation on the defendant. Article 50 of the lease provides, in relevant part, that in the event the defendant fails to vacate the premises upon the expiration of the lease, the defendant's occupancy shall be considered a month-to-month tenancy at double the base monthly rent fixed by the lease.

The defendant ceased making rental payments in February 2020. On April 23, 2021, the plaintiff sent the defendant a notice of default pursuant to Article 74 of lease, explaining that the defendant owed $280,645.31 in base rent arrears, plus additional rent. The defendant did not

cure its default. On May 13, 2021, the plaintiff sent the defendant a notice of cancellation of the lease, terminating the lease effective May 20, 2021.

The defendant has not surrendered the premises and continues to occupy and operate its takeout restaurant, albeit at a loss for the last two years. The defendant received a Paycheck Protection Program (PPP) loan in the sum of $96,992.00 in May 2020, having represented in its application that $31,000.00 of such loan would go to rent. Notwithstanding, the defendant has not made any payment to the plaintiff since February 2020.

III. DISCUSSION

A. Defendant's Cross-Motion

The defendant moves to dismiss the complaint in this action pursuant to BCL § 1312(a), which provides, in relevant part,

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

The defendant avers that the plaintiff is a Nevada corporation doing business in New York without the requisite authorization. The plaintiff admits that it mistakenly failed to register to do business in the State after merging with a Nevada corporation some years ago, notwithstanding that the plaintiff continues to pay New York City and State taxes. The plaintiff further states that it has been unable to register since the filing of the defendant's cross-motion, when it was alerted to its error, because another corporation registered under the plaintiff's corporate name on the very same date the cross-motion was filed.

No party disputes that the plaintiff was unregistered to do business in New York when it commenced this action and that it remains unregistered, in contravention of BCL § 1312(a). However, the defendant is not entitled to dismissal of the complaint on this ground inasmuch as the defendant failed to raise the issue of registration on a pre-answer motion to dismiss or in its answer, filed on September 8, 2021. Thus, any lack of capacity defense is waived. CPLR 3211(e). The defendant's insistence that its belated invocation of BCL § 1312(a) is not a lack of capacity defense is both nonsensical and directly contradicted by controlling appellate authority. To be sure, it is well-settled that "[a] defense that a corporate plaintiff has failed to comply with the requirements of Business Corporation Law § 1312 is based on the premise that plaintiff is without legal capacity to sue, and this defense is waived unless raised either by motion to dismiss or in the responsive pleading." RCA Records v Wiener, 166 AD2d 221, 221 (1st Dept. 1990); see also Household Bank (SB), N.A. v Mitchell, 12 AD3d 568, 568 (2nd Dept. 2004); FBB Asset Mgrs. v Freund, 2 AD3d 573, 574 (2nd Dept. 2003).

Accordingly, the defendant's cross-motion to dismiss the complaint is denied.

B. Plaintiff's Motion

i. Summary Judgment and Dismissal of Affirmative Defenses

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d

499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of the instant motion, the plaintiff submits, *inter alia*, the pleadings, an attorney's affirmation, the affidavit of the plaintiff's president, David Henry Simon, the subject lease and rider thereto, the plaintiff's notice of default, and the plaintiff's notice of cancellation.

The plaintiff's submissions establish, *prima facie*, the plaintiff's entitlement to judgment on the first cause of action sounding in ejectment against the defendant, insofar as they establish that the plaintiff was either ousted or deprived of possession of real property, and that it has a right to re-enter and take possession. See GMMM Westover, LLC v New York State Elec. & Gas Corp., 155 AD3d 1176 (3rd Dept. 2017); RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC, 144 AD3d 1125 (2nd Dept. 2016). Specifically, the parties' lease was properly terminated as of May 20, 2021, but the defendant did not vacate the premises and has continued to hold over without the plaintiff's permission. See NY RP Act & Pro § 601.

The submissions further establish that the plaintiff is entitled to judgment on the issue of liability on the second cause of action, seeking rent and additional rent arrears, inasmuch as the plaintiff demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well-settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st

Dept. 1995), aff'd 88 NY2d 716 (1996). Here, the plaintiff establishes that the defendant ceased paying rent and additional rent due under the lease beginning in February 2020, and that the defendant continued to default on its payment obligations through the date of termination of the lease, May 20, 2021. The plaintiff is thus entitled to base rent and additional rent at the rates provided in the lease through the date of lease cancellation.

Likewise, the plaintiff is entitled to judgment on the issue of liability on the third cause of action, seeking holdover rent at the rate described in Article 50 of the lease. Specifically, the plaintiff is entitled to recover double the base monthly rent fixed in the lease beginning on May 20, 2021, the date the defendant began to hold over, through the date the defendant vacates the premises. It is well-settled that commercial lease provisions providing for holdover rent at multiples of the monthly rent due under a lease are enforceable and recoverable as damages in an action to recover possession of real property where, as here, there is no showing that the amount fixed is plainly or grossly disproportionate to the probable loss. See Tenber Assocs. v Bloomberg, 51 AD3d 573, 574 (1st Dept. 2008); Fed. Realty Ltd. Partnership v Choices Women's Med. Ctr., Inc., 289 AD2d 439, 441-442 (2nd Dept. 2001).

The plaintiff's submissions are insufficient, however, to establish entitlement to the specific sum claimed in damages under the second and third causes of action. To begin, the plaintiff does not submit a ledger or other detailed breakdown of rent and additional rent due for each month of the lease term or holdover period, nor does the plaintiff provide supporting documentation for any additional rent items, such as unpaid real estate taxes, unpaid water and sewage usage charges, and bank fees for the defendant's stopping payment on a check delivered to the plaintiff in March 2020. Moreover, while it is undisputed that the defendant continues to occupy the premises without making any payments, and that the plaintiff is entitled to holdover

rent through the date of vacatur, the plaintiff necessarily provides support only for holdover rent due through November 18, 2021, the date it filed its motion. Finally, the lump sum of arrears claimed by the plaintiff does not reflect any application of the defendant's $63,374.25 security deposit to offset the total damages. While the plaintiff correctly contends that Section 31 of the lease permits, but does not require, the plaintiff to apply the security deposit to satisfy any default of the defendant, Section 31 does not permit the plaintiff to both refuse to apply the deposit and refuse to return it to the defendant as an additional penalty. Since the plaintiff does not dispute that it presently retains the deposit, the sum owed to the plaintiff must be reduced by $63,374.25 unless the plaintiff demonstrates that it has, in fact, returned the deposit upon the defendant's vacatur.

In light of the foregoing evidentiary deficiencies, the court refers the issue of the total sum due to the plaintiff under the second and third causes of action to a Court Referee or Judicial Hearing Officer (JHO) to hear and report.

The plaintiff has not demonstrated entitlement to judgment on the fourth cause of action, sounding in indemnification. Indeed, the plaintiff fails to address any argument to such cause of action in its supporting papers.

As to the fifth cause of action, which seeks attorneys' fees, the plaintiff is entitled to such fees pursuant to Section 19 of the lease. However, the plaintiff does not submit supporting documentation establishing the amount to which it is entitled. The issue of the amount of attorneys' fees due to the plaintiff is therefore also referred to a Court Referee or JHO to hear and report.

The defendant fails to raise a triable issue as to any cause of action in its opposition, which, aside from the defendant's lack of capacity argument, is largely limited to assertions that

the plaintiff's motion should be denied because (1) the parties orally agreed to a reduction in the defendant's rent obligations in February 2020, (2) the plaintiff harassed the defendant's principal, Christopher Pizzimenti (Pizzimenti) with "general threats" about Pizziment's family, kids, and credit, and (3) summary judgment is premature. The defendant's arguments are unpersuasive.

As to the first, the defendant's self-serving and otherwise unsupported allegation that the plaintiff agreed to a rent reduction does not suffice to create an issue of fact. Moreover, any purported oral modification is barred by Article 20 of the lease, which provides that the lease may not be changed, modified, discharged, or abandoned orally, but only in writing and signed by the parties. "Where a lease contains a clause requiring that any modification of the terms of such lease to be in writing signed by the landlord, an oral modification is generally precluded." Joseph P. Daly Realty Corp. v Jeffrey Lawrence Assocs., Inc., 270 AD2d 140, 141 (1st Dept. 2000); see Richardson & Lucas, Inc. v New York Athletic Club, 304 AD2d 462 (1st Dept. 2003); Two Wall Street Assocs. Limited Partnership v Anderson, Raymond & Lowenthal, 183 AD2d 498 (1st Dept. 1992); General Obligations Law 15-301(1).

As to the second, the defendant's vague allegations that its principal was harassed because the plaintiff sought deficient rent and additional rent payments from him over the phone and, after nearly two years of nonpayment, by filing lawsuits, is not a defense to the plaintiff's claims.

As to the third, the defendant "fails to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth.

Bus Co., 127 AD3d 421, 423 (1st Dept. 2015). It is well-settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See State ex rel Perkins v Cooke Center for Learning & Dev., Inc., 164 AD3d 445 (1st Dept. 2018); Tavares v Herrasme, 140 AD3d 453 (1st Dept. 2016); Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Kent v 534 East 11th Street, supra.

Finally, for the reasons described in the plaintiff's moving papers, the defendant's affirmative defenses are without merit and subject to dismissal. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011).

The court notes that there is no showing of any efforts by the plaintiff or the named defendant to identify the fictitious defendant. Since it was never identified, the plaintiff is precluded from relying on CPLR 1024 to maintain this action against that party (see generally Fountain v Ocean View II Assocs., L.P., 266 AD2d 339 [2nd Dept. 1999]), and the complaint must be dismissed against it. In light of such dismissal, the defendant's cross-claim for indemnification is academic.

ii. Remaining Relief

While a court has broad discretion in awarding prospective use and occupancy pending the outcome of an action in which the plaintiff seeks ejectment and holdover rent, (see 43rd Street Deli v Paramount Leasehold, L.P., 107 AD3d at 501 [1st Dept. 2013]), the court has already determined in the instant Decision, Order, and Judgment that the plaintiff is entitled to a final award of possession and of rent arrears and holdover rent, in a sum to be calculated after a damages hearing before a Court Referee or JHO. Thus, the plaintiff's application for *pendente lite* relief is denied as academic.

Likewise, the plaintiff's application for a hearing to determine that the defendant's hardship declaration dated April 30, 2021, is invalid, is denied as academic in light of the expiration of New York's COVID-19 Emergency Eviction and Foreclosure Prevention Act on January 15, 2022.

Finally, consolidation with a related action the plaintiff commenced against the defendant's guarantor under the lease is not warranted in light of the disposition of substantially all of the claims in this case.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of the plaintiff Daper Realty, Inc., is granted to the extent that (1) the plaintiff is awarded judgment on the first cause of action sounding in ejectment to the extent provided herein, (2) the plaintiff is awarded judgment on the issue of liability on the second, third, and fifth causes of action, (3) the court refers the issue of damages on the second, third, and fifth causes of action to a Judicial Hearing Officer (JHO) or Special Referee to hear and report, and (4) the affirmative defenses asserted by the defendant Al Horno Lean Mexican 57, Inc., are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of the defendant Al Horno Lean Mexican 57, Inc., is denied in its entirety; and it is further

ORDERED, ADJUDGED, and DECLARED that the plaintiff Daper Realty, Inc., is entitled to possession of the real property consisting of the ground floor and the basement immediately beneath in the building bearing the street address of 1089 Second Avenue, New York, New York, 10022, and the Sheriff or Marshall of the City of New York, County of New

York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, the plaintiff may exercise all acts of ownership and possession of the real property consisting of the ground floor and the basement immediately beneath in the building bearing the street address of 1089 Second Avenue, New York, New York, 10022, including entry thereto, as against the defendant Al Horno Lean Mexican 57, Inc., except that the right to re-entry shall be stayed for a period of 30 days after service of a copy of this Decision, Order, and Judgment with notice of entry by regular first class mail upon the defendant Al Horno Lean Mexican 57, Inc.; and it is further

ORDERED and ADJUDGED that the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, is hereby directed and authorized, upon receipt of a certified copy of this Decision, Order, and Judgment, to take all necessary steps, including but not limited to the entry into the premises at the real property consisting of the ground floor and the basement immediately beneath in the building bearing the street address of 1089 Second Avenue, New York, New York, 10022, to effect the removal and ejection of the defendant Al Horno Lean Mexican 57, Inc., and every person holding possession or the same or any part thereof under the defendant Al Horno Lean Mexican 57, Inc., and adversely to the plaintiff, as the current owner of the premises, and the plaintiff shall be let into possession of said premises at the real property consisting of the ground floor and the basement immediately beneath in the building bearing the street address of 1089 Second Avenue, New York, New York, 10022, and this Decision, Order, and Judgment be executed by the Sheriff of the City of New York, County of New York, or any duly appointed City Marshal, as though it were an execution for the

delivery of possession of said premises, with the eviction and delivery of possession of the premises to be stayed for a period of 30 days after service upon the defendant Al Horno Lean Mexican 57, Inc., by regular first class mail, of a copy of this Decision, Order, and Judgment with notice of entry; and it is further

ORDERED AND ADJUDGED that all claims and cross-claims herein are dismissed as against the fictitious defendant XYZ Corp.;

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the amount of damages to which the plaintiff is entitled from defendant Al Horno Lean Mexican 57, Inc., under the second, third, and fifth causes of action, through the date of such defendant's vacatur of the subject premises or the date of the hearing, whichever is earliest;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a proposed pre-hearing memorandum within 24 days from the date of this order and the defendant Al Horno Lean Mexican 57, Inc., shall serve a pre-hearing memorandum within 20 days from service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by

filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the plaintiffs shall serve a copy of this Decision, Order, and Judgment with notice of entry upon the defendant Al Horno Lean Mexican 57, Inc., by regular first-class mail, within 15 days of its entry.

This constitutes the Decision, Order, and Judgment of the court.

HON. NANCY M. BANNON

DATED: October 5, 2022