

Second 82nd SM LLC, v BF NY 82, LLC
2022 NY Slip Op 33724(U)
October 26, 2022
Supreme Court, New York County
Docket Number: Index No. 654907/2021
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

SECOND 82ND SM LLC,

Plaintiff,

- v -

BF NY 82, LLC, BURGERFI INTERNATIONAL,
LLC, BURGERFI INTERNATIONAL, INC.

Defendant.

-----X

INDEX NO. 654907/2021

MOTION DATE 12/14/2021,
12/16/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 69

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 29, 30, 31, 32, 33, 34, 35, 36, 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, 70, 71

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, defendants' BurgerFi International, LLC and BurgerFi International, Inc. (collectively, "Guarantors") motion to dismiss is denied, motion sequence 002, and plaintiff's motion for summary judgment as against the BF NY 82, LLC d/b/a BurgerFi, ("Tenant") is granted without opposition, motion sequence 003, and plaintiff's cross-motion of its own motion is denied as procedurally improper.

Background

The instant action arises out of Tenant's alleged failure to pay rent due under a commercial lease. Plaintiff also seeks to recover damages from Guarantors pursuant to a guaranty related to Tenant's obligations under the lease.

It is undisputed that Tenant remains in possession of the commercial space, located at 240 East 82nd Street New York, New York, pursuant to a written lease agreement dated

September 10, 2012. The term of the lease is fifteen years and four months, commencing on September 14, 2012, and expiring on January 31, 2028. Beginning in July 2020, plaintiff alleges that Tenant defaulted on its obligations and failed to pay rent, additional rent and all other sums and charges due and owing to plaintiff pursuant to the lease.

Motion Sequence 002

Defendants, Guarantors, move to dismiss the complaint on the grounds that Tenant and Guarantors are excused from their obligations under the lease and guaranty, respectively, because of the COVID-19 pandemic and resulting governmental restrictions. The Guarantors contend that the pandemic and the ensuing government restrictions rendered performance of the lease and guaranty impossible. This however is not the law in this Judicial Department, or elsewhere that the Court is aware. Notably, one of the cases cited by plaintiff to support its position, *The Gap, Inc. v 170 Broadway Retail Owner, LLC*, 2020 NY Slip Op. 33623[U], [Sup Ct, New York County 2020], was reversed by the First Department (*Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021]).

The First Department held that absent any provision in the lease that stated otherwise, reduced revenue does not render performance of the lease impossible. *Id* at 577, internal citations omitted. Accordingly, the Guarantors motion to dismiss the complaint is denied.

Motion Sequence 003¹

Plaintiff moves pursuant to CPLR § 3212, for an order granting summary judgment as against defendant, Tenant, awarding a money judgment for rental arrears; awarding a money judgment in favor of plaintiff on its fifth cause of action for attorneys' fees; dismissing the first through fourth affirmative defenses raised in Tenant's answer; and granting a judgment in favor

¹ Plaintiff cross-moved on its own motion and sought relief as against the Guarantors. As this is procedurally improper, plaintiff's cross-motion is denied without prejudice and not considered.

of plaintiff for interim use and occupancy and directing Tenant to pay plaintiff ongoing use and occupancy, pendente lite, in advance on the first day of each month in an amount equal to the rental rates set forth in the lease agreement dated September 10, 2012.

In support of tis motion, plaintiff has annexed the subject lease as well as affidavits of David Malanga, Director of Construction and Commercial Property Management and Estralda Tudor-Davis, Collector of Accounts Receivable. The affidavits established Tenants payment history and rental and fee accrual since July 2020 through September 1, 2021.

Although Tenant has appeared in this action, plaintiff's motion is unopposed. Plaintiff has established its *prima facie* entitled to judgment as a matter of law as to its first and fifth causes of action. Accordingly, it is hereby

ORDERED that defendants' BurgerFi International, LLC and BurgerFi International, Inc. motion to dismiss is denied; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the first cause of action of the complaint is granted without opposition; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff in the amount of \$680,623.80 as against defendant BF NY 82- LLC d/b/a BURGERFI; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment dismissing the counterclaims is granted without opposition; and it is further

ORDERED that defendant is directed to pay prospective use and occupancy to plaintiff for its use of the subject premises at the rate of \$31,314.56. per month, beginning as of January 1, 2022 and continuing for the pendency of this action without prejudice to any other rights, claims, remedies, or damages available to the parties; and it is further

ORDERED that an assessment of damages as to the fifth cause of action for attorneys' fees will be determined at the time of trial; and it is further

ORDERED that the balance of the action is severed and continued; and it is further

ORDERED that the Guarantors are directed to answer this matter not more than twenty days following service of this Decision and Order with notice of entry.

10/26/2022

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE