

**ESRT 501 Seventh Ave., L.L.C. v Chao Bella Cut &
Dry Bar, Inc.**

2023 NY Slip Op 30468(U)

February 10, 2023

Supreme Court, New York County

Docket Number: Index No. 656545/2020

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

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ESRT 501 SEVENTH AVENUE, L.L.C.,

Plaintiff,

- v -

CHAO BELLA CUT & DRY BAR, INC., and ISAAC
SOSUNOV,

Defendants.

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INDEX NO. 656545/2020

MOTION DATE 07/01/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, and 108 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that plaintiff’s motion is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 53, 65, 74, 104-106) and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, plaintiff has established prima facie entitlement to summary judgment against defendant Chao Bella Cut & Dry Bar, Inc. (“tenant”) by submission of “the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]). Plaintiff has also established prima facie entitlement to summary judgment against defendant Isaac Sosunov (“Sosunov”), by submission of the executed guarantee and proof of defendant’ failure to pay sums owed thereunder (*Gard Entertainment, Inc. v Country in New York, LLC*, 96 AD3d 683, 683 [1st Dept 2012] [“Here, plaintiff established its entitlement to summary judgment as against Block by demonstrating proof of the guarantee he made in

connection with a note executed by Country and his failure to make payments called for by its terms”)).

In opposition, defendants fail to raise a material issue of fact requiring trial. Defendants raise twelve affirmative defenses and three counterclaims. The first three affirmative defenses for failure to state a cause of action and eleventh affirmative defense of good faith are unsupported by any factual allegations and subject to dismissal (*Robbins v Grownney*, 229 AD2d 356, 358 [1st Dept 1996]) (“bare legal conclusions are insufficient to raise an affirmative defense”). The fourth and ninth affirmative defenses asserting lack of jurisdiction due to improper service have been waived, as defendants failed to move for judgment on that ground within 60 days of their answer (CPLR 3211[e]). The fifth affirmative defense that Sosunov is misnamed in the caption is irrelevant, as he avers in his affidavit that he is “Isaac Sosunov a/k/a Avshalum Sosunov” (Sosunov aff., NYSCEF Doc. No. 75, ¶ 8), and Isaac Sosunov is the name he used when signing the guarantee (guarantee, NYSCEF Doc. No. 56 at 9). The sixth, seventh, and eighth affirmative defenses for impracticability, impossibility of performance, frustration of purpose are unavailing, as the Appellate Division, First Department, has largely established that such defenses are not implicated by temporary closures and reduced capacity as a result of the ongoing COVID-19 pandemic (*e.g. Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022]) [“We have already rejected plaintiff Gap's contention that Executive Order No. 202.8 rendered it objectively impossible to perform its operations as a retail store where, as here, Gap filed its complaint after reopening was allowed”]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022]) [“New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic, was

temporary”)). The lease also provides that government regulations arising out of a national emergency do not excuse tenant’s obligation to pay rent (lease, NYSCEF Doc. No. 54, § 22[A]). Finally, the tenth affirmative defense of failure to mitigate and the twelfth affirmative defense regarding proposed legislation regarding early termination do not refer to any duty or obligation imposed on plaintiff. As a general matter, a commercial landlord has no duty to relet the premises at all for any amount (*Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133 [1995]).

Turning to the counterclaims, the counterclaim for unjust enrichment fails because the dispute between the parties is covered by enforceable contracts (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). The counterclaim for constructive trust fails because there is no confidential or fiduciary relationship between the parties (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). Finally, the breach of contract counterclaim fails because defendants fail to allege the specific provisions of the lease giving rise to liability (*Matter of Sud v Sud*, 211 AD2d 423 [1st Dept 1995]). Moreover, to the extent that defendants claim plaintiff is withholding the security deposit, they do not set forth a triable issue of fact that plaintiff is doing so in breach of the lease.

With respect to damages, the full amount of arrears as set forth in the rent ledger is assessed against tenant. However, as plaintiff concedes (Pl.’s memorandum of law, NYSCEF Doc. No. 74 at 9 n 3), Sosunov is protected by the New York City Administrative Code provision (the “Guaranty Law,”) from liability for any rent default arising between March 7, 2020 and June 30, 2021 (Administrative Code of City of NY § 22-1005[2]). According to the attached rent ledger, only \$19,774,41 became due and owing after June 30, 2021 (rent ledger, NYSCEF Doc. No. 59).

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Chao Bella Cut & Dry Bar, Inc., in the amount of \$277,265.12, plus interest on \$65,183.72 of that amount from September 1, 2020 through February 28, 2021, plus interest on \$145,481.40 of that amount from March 1, 2021 at the statutory rate through entry of judgment as calculated by the Clerk, and accruing thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Isaac Sosunov, in the amount of \$19,774.41, plus interest thereon at the statutory rate from July 1, 2021 through entry of judgment as calculated by the Clerk, and accruing thereafter through satisfaction of judgment, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff is entitled to its reasonable attorneys' fees in this action pursuant to the lease and guarantee (lease, NYSCEF Doc. No. 54, §§ 6, 7; guarantee, NYSCEF Doc. No. 56, ¶ 12), and the issue of the amount of such fees is severed and set down for a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for a hearing on attorneys' fees in Room 1166, 111 Centre Street, New York, New York, on March 14, 2023 at 10:00 AM.

This constitutes the decision and order of the court.

Louis L. Nock

2/10/2023

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: