

**3750 Broadway BCR, LLC v Grand Express Deli & Grocery Corp.**

2023 NY Slip Op 30821(U)

March 13, 2023

Supreme Court, New York County

Docket Number: Index No. 656989/2021

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*

-----X

3750 BROADWAY BCR, LLC,

Plaintiff,

- v -

GRAND EXPRESS DELI AND GROCERY CORP., AQEL A.  
ALLAHABI, and EBRAHIM SHAIBAN,

Defendants.

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**INDEX NO.** 656989/2021

**MOTION DATE** 06/24/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 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, 38, 39, and 40 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ORDERED that so much of the plaintiff's motion seeking summary judgment against defendants Grand Express Deli and Grocery Corp. ("assignee tenant") and Ebrahim Shaiban ("Shaiban," and collectively, the "Shaiban defendants") is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 12-13, 20-21, 37) and the exhibits attached thereto, in which the court concurs. As more specifically set forth therein, plaintiff 3750 Broadway BCR, LLC ("landlord"), has established prima facie entitlement to summary judgment against assignee 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," as well as the assignment of the lease from defendant Aqel A. Allahabi ("assignor tenant") to assignee tenant (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]). Landlord has also established prima facie entitlement to summary judgment against defendant Shaiban, by submission of the executed guarantee and proof of defendant's 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”]). Shaiban’s argument that there was no consideration for the guarantee is unsupported by the record.

In opposition, the Shaiban defendants fail to raise a material issue of fact requiring trial. They raise twelve affirmative defenses, all of which, save the eleventh, are unsupported by any factual allegations (*Robbins v Grownney*, 229 AD2d 356, 358 [1st Dept 1996]) (“bare legal conclusions are insufficient to raise an affirmative defense”). Moreover, the Shaiban defendants fail to respond to landlord’s arguments in favor of all affirmative defendants, save the eleventh, which are also grounds to dismiss those defenses (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] [“By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed”]). The first counterclaim for attorneys’ fees must be dismissed as well, as the said defendants have shown no entitlement thereto.

The eleventh affirmative defense and second counterclaim assert that landlord erected a sidewalk shed and scaffolding that partially obscured the rented premises, thus constructively evicting the Shaiban defendants. “A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended” (*Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999]). “To demonstrate constructive eviction, then, a tenant must vacate the premises” (*Prakhin v Fulton Towers Realty Corp.*, 122 AD3d 601, 603 [2d Dept 2014]). The Shaiban defendants fail to establish that they were constructively evicted from any part of the premises, per the foregoing standard; nor do

they point to any provision of the lease, assignment, or Shaiban's guarantee, pursuant to which the assignee tenant (defendant Grand Express Deli and Grocery Corp.) could abate the rent or recover allegedly lost profits. Thus, the eleventh affirmative defense and second counterclaim must also be dismissed.

AND IT IS FURTHER

ORDERED that the Shaiban defendants' affirmative defenses and counterclaims are severed and dismissed; and it is further

ORDERED that so much of the motion as seeks a default judgment against assignor tenant (defendant Aqel A. Allahabi) is granted. A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzetti v City of N.Y.*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, landlord submits the lease (NYSCEF Doc. No. 14), the affidavit of its managing agent (NYSCEF Doc. No. 12), an arrears statement (NYSCEF Doc. No. 18), and the assignment of the lease, which provides that assignor tenant remained obligated to pay the rent following

assignment to assignee tenant (NYSCEF Doc. No. 16, ¶ 3[a]). Landlord also submits the affidavits of service and additional mailing on assignor tenant (NYSCEF Doc. Nos. 9, 19), and the affirmation of its counsel, who attests that assignor tenant’s time to answer has expired (NYSCEF Doc. No. 13, ¶¶ 4-5). Accordingly, landlord is entitled to a default judgment against defendant Aqel A. Allahabi on the first cause of action for breach of the lease.<sup>1</sup>

AND IT IS FURTHER

ORDERED that a further hearing will be held before the undersigned to determine the total amount of plaintiff’s damages, including those that have accrued since this motion was fully submitted, as well as the amount of plaintiff’s reasonable attorneys’ fees as provided by the lease (NYSCEF Doc. No. 14, ¶ 32[e]) and Shaiban’s guaranty (NYSCEF Doc. No. 17 at 1); and it is further

ORDERED that the parties shall appear for said hearing on April 18, 2023, at 10:00 AM, in Room 1166, 111 Centre Street, New York, New York.

This constitutes the decision and order of the court.



<u>3/13/2023</u> DATE			<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>1</sup> Landlord may not recover against assignor tenant under assignor tenant’s guarantee, requiring denial of the motion as to the second cause of action, as assignor tenant cannot serve as a guarantor of his own debt (*1471 Second Corp. v NAT of NY Corp.*, 162 AD3d 449, 450 [1st Dept 2018] [“As a rule, an interpretation of an instrument that would result in making a person or entity the guarantor of his, her or its own debt must be rejected”] [internal quotation marks and citation omitted]).