

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

2023 NY Slip Op 31954(U)

June 8, 2023

Supreme Court, New York County

Docket Number: Index No. 654541/2020

Judge: Arlene P. 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 P. BLUTH PART 14

*Justice*

-----X

128 SECOND REALTY LLC, STELLAR 128 SECOND LLC,

Plaintiff,

- v -

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

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 123, 124, 125

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Plaintiffs motion to amend is granted.

### **Background**

Defendant Toscana Pizza Inc. dba 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.

Now, plaintiffs move to amend to add a contract claim against the individual defendants (defendants Rodriguez, Keraj and Salihaj). Plaintiffs emphasize that a recent ruling in a federal court case found that a New York City Administrative Code provision, which had previously protected individual guarantors in commercial lease cases during the height of the pandemic, was unconstitutional.

In opposition, defendants claim that the proposed amendment is without merit. They emphasize the case is in a late stage of discovery. Defendants also make arguments on the merits of the case and insist that plaintiff partially evicted them by changing the locks. Defendants insist that plaintiffs did not terminate the tenancy properly prior to the use of self help and so plaintiffs do not have a cognizable claim against the individual defendants (the guarantors).

In reply, plaintiffs argue that defendants did not raise a genuine objection to the requested amendment. They also point out that defendants' eviction arguments were rejected by this Court.

## Discussion

“Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise. However, leave will be denied where the proposed amendment lacks merit or would serve no purpose other than to needlessly complicate and/or delay discovery and trial” (*Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523, 523, 111 NYS3d 268 [1st Dept 2019] [internal quotations and citations omitted]).


The Court grants the motion. As an initial matter, the Court observes that defendants did not make any arguments whatsoever about the merits of the ruling in *Melendez v City of New York*, 20-CV-5301 (RA), 2023 WL 2746183 [SD NY 2023]). In that case, the federal court concluded that NYC Administrative Code § 22-1005 “violates the Contracts Clause by rendering the guaranty clauses in Plaintiffs’ commercial leases unenforceable for unpaid rent during the covered period, March 7, 2020 and June 30, 2021” (*id.*). In other words, plaintiffs simply want to amend their complaint to add claims that were previously barred by this statutory provision. That constitutes a valid reason to amend and the proposed amended complaint states a new cognizable cause of action.

To the extent that defendants make arguments about the merits of the instant case, specifically with respect to their partial eviction claim, the Court finds that is not a valid basis to deny the instant motion. Plaintiffs merely had to state a cognizable claim in their proposed amended pleading; they did not have to prove the claim as a matter of law. Moreover, as plaintiffs pointed out, the Court has already found that defendants’ partial eviction claims are not a basis to dismiss this entire case.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to amend is granted and plaintiffs shall upload their proposed amended complaint (now uploaded as NYSCEF Doc. No. 116) as a separately e-filed document to NYSCEF on or before June 28, 2023 and defendants shall answer or otherwise respond pursuant to the CPLR.

See NYSCEF Doc. No. 122 about the next conference.

<u>6/8/2023</u>					
DATE			ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<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