

Dongqi 79 Alumni, Inc. v United POS Inc.

2023 NY Slip Op 32225(U)

June 27, 2023

Supreme Court, New York County

Docket Number: Index No. 657068/2021

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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DONGQI 79 ALUMNI, INC,

Plaintiff,

- v -

UNITED POS INC., KEVIN ZHE DIN, XIUQIN LIU, YIU SUN
CHEUNG

Defendants.

-----X

INDEX NO. 657068/2021

MOTION DATE 06/22/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 40, 41, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff’s motion for summary judgment and to dismiss defendants’ affirmative defenses and counterclaims is granted and the cross-motion by defendants for leave to file an amended answer is denied.

Background

In this commercial landlord-tenant dispute, plaintiff contends that defendant United POS, Inc. (the “Tenant”) took occupancy of a commercial premises owned by plaintiff pursuant to an Assignment and Assumption of Lease Agreement dated December 2016. Plaintiff asserts that the named defendants entered into personal guarantees for the lease.

It contends that the Tenant vacated the premises in August 2020 (before the lease expired in 2025) and that the Tenant and the individual guarantors owe outstanding rent. Plaintiff alleges that it found another tenant in August 2021 and has applied a credit for the rent to be collected from this new tenant.

In opposition and in support of their cross-motion, defendants contend that there are material issues of fact that should compel the Court to deny plaintiff's motion. They argue that they were constructively evicted from the premises and that plaintiff is barred from recovering certain sums under the doctrine of promissory estoppel. Defendants observe that the roof was defective and in dire need of repair. They insist that water leaking from the roof infiltrated the premises and caused serious damage. Defendants argue that the roof is considered a "public portion" of the building and therefore is plaintiff's responsibility to maintain and repair.

They complain that the continuous water leaks led to a mold problem as well as noxious odors. Defendants insist that the leak caused damage to the electrical wiring and a significant portion of the premises was left without power for the duration of its occupancy of the premises. They argue that for the months of April through July 2020, plaintiff is estopped from seeking rent as it agreed to reduce the rent during this period. Defendants insist that in May 2020, the leaking roof caused them to leave the premises as plaintiff refused to perform the necessary repairs to that defendants could use the space. They seek to amend their answer to add the defense of constructive eviction.

Plaintiff claims in reply that there are no issues of material fact because defendants' purported defenses and counterclaims are precluded by the subject lease. It focuses on a provision of the lease that required the Tenant to make electrical repairs as well as to maintain the roof.

In reply, defendants claim that their request for leave to amend is timely as no discovery has yet been exchanged and that their proposed amended verified answer sets forth legitimate defenses that compel the Court to deny the instant motion.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court observes that defendants do not dispute that they agreed to the terms of the lease and the personal guarantees. Therefore, the Court’s analysis must begin with the terms of the lease.

It provides that “Tenant herein accepts the premises in "AS IS" condition without any representation or warranty as to use or condition of the demised premises and agrees to keep the

demised premises in good condition and repair. It is further agreed that the Tenant shall service, repair and maintain the premises at its own expense including but not limited to repair and replacement-of heating, air conditioning, plumbing, electrical systems, exterior structure (including but not limited to gates, handrails, steps and/or fences, plate glass), sidewalk and roof” (NYSCEF Doc. No. 18, at 8).

Defendants do not dispute that they failed to pay the rent. Instead, they focus on another provision that required plaintiff to maintain and repair the “public portions of the building.” However, that does not raise a material issue of fact that compels the Court to deny plaintiff’s motion. “A guiding legal principle of contract interpretation, *generalia specialibus non derogant*, holds that specific provisions control over general provisions when an issue may be governed by either” (*Rosen's Cafe, LLC v 51st Madison Gourmet Corp.*, 2013 WL 11230470 [Sup Ct, New York County 2013]). Here, a specific provision required defendants to repair and maintain the roof as well as the electrical systems and the gates—the very issues defendants cite as a basis for why they are not liable for unpaid rent (defendants complain about the roof leaking, the lack of electrical power and a faulty front gate). In other words, the specific provision controls over a general provision about public portions of the building. It evinces an express intention to have the Tenant address the maintenance and repairs for these issues.

With respect to defendants’ cross-motion for leave to amend, the Court observes, as a procedural matter, that the proposed amended answer was submitted in a way that does not clearly show the changes and additions as required under CPLR 3025(b). That compels the Court to deny the cross-motion on that basis. However, the alleged delay in seeking leave to amend is not a basis to deny this relief as plaintiff did not suffer any prejudice.

On the merits, the Court finds that the affirmative defenses and counterclaims should be dismissed. Based on the lease provision cited above, defendants did not raise an issue of fact about their affirmative defenses of failure to state a cause of action, laches, or the first and second counterclaims (also pled as the sixth and seventh affirmative defenses) based upon plaintiff's alleged failure to meet its obligations under the lease. The lease clearly required the Tenant to make the repairs that allegedly caused the Tenant to leave the premises before the expiration of the lease. And the Tenant did not raise another cognizable defense to not paying the rent.

The third affirmative defense contends that plaintiff failed to name a necessary party—the estate of defendant Yiu Sun Cheung as this defendant passed away in 2017. Plaintiff observes that it discontinued the case as against this defendant in November 2022. Therefore, this affirmative defense fails as plaintiff is no longer seeking recovery against this defendant or his estate.

The fourth affirmative defense claims that plaintiff agreed to reduce the rent. But as plaintiff points out, the lease could not be modified orally and instead required that any changes be made “by a writing signed by both parties. Any reliance upon any oral representations whatsoever shall be deemed unreasonable and unenforceable” (NYSCEF Doc. No. 18, ¶ 44). Therefore, any discussions about reducing the rent does not state a cognizable affirmative defense. That defendants submitted a portion of a text message conversation does not establish a material issue of fact about whether the lease was properly modified to reduce the rent. The text message conversation does not lay out the terms of a lease modification. It does not, for instance, discuss whether plaintiff was deferring defendants' rent obligations or whether plaintiff was affirmatively waiving outstanding rent.

The fifth affirmative defense is also without merit as the ban on enforcing personal guarantees in connection with commercial leases was recently ruled unconstitutional (*see Melendez v City of New York*, 20-CV-5301 (RA), 2023 WL 2746183 [SD NY 2023]).

Plaintiff is therefore entitled to the \$140,297.99 it seeks plus legal fees as provided under the terms of the lease less the amounts it anticipates it will receive from the current tenant. Interest shall run from the date of this decision (a reasonable midpoint), as plaintiff seeks to recover from April 2020 through September 2025. Plaintiff shall make a separate motion for reasonable legal fees on or before July 21, 2023.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted, defendants' affirmative defenses and counterclaims are severed and dismissed and the Clerk is directed to enter judgment in favor of plaintiff and against ONLY defendants UNITED POS INC., KEVIN ZHE DIN, XIUQIN LIU in the amount of \$140,297.99 plus statutory interest from the date of this decision along with costs and disbursements; and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff must make a separate motion for such fees on or before July 21, 2023; and it is further

ORDERED that all claims are dismissed as against defendant YIU SUN CHEUNG as plaintiff previously discontinued its claims against this defendant (nothing prevents plaintiff from potentially seeking relief against this defendant's estate); and it is further

ORDERED that defendants' cross-motion is denied.

6/27/2023

DATE



ARLENE P. BLUTH, J.S.C.

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CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

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NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE