

**Pema Enters. Inc. v New Ninth Ave. Corp.**

2023 NY Slip Op 32585(U)

July 18, 2023

Supreme Court, New York County

Docket Number: Index No. 651538/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

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INDEX NO. 651538/2021

PEMA ENTERPRISES INC.,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

**DECISION + ORDER ON  
MOTION**

NEW NINTH AVENUE CORP.,  
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 37, 38

were read on this motion to/for RESTORE/AMEND

Plaintiff, a commercial tenant, commenced an action for a declaratory judgment to determine its rights under a written lease agreement with defendant, its landlord, relating to the demised premises known as 857 Ninth Avenue, South Store and Basement, New York, New York 10019 (“premises” or “restaurant”). As relevant background, in September 1999, plaintiff obtained an assignment of a lease with defendant for the premises. In or about December 2020, plaintiff, as sublessor, entered into an agreement with Glitteraty Oasis Bakery, Inc., as subtenant, for the restaurant. On January 29, 2021, plaintiff, on behalf of its subtenant, sought to obtain defendant’s written consent to perform certain alteration work at the premises, as described in a Scope of Work letter from Kanaris Contracting Corp. Plaintiff asserts that, to date, defendant has failed to provide any response to its written request.

In March 2021, plaintiff commenced this declaratory judgment action seeking an order stating that, pursuant to the lease agreement, plaintiff is permitted to perform the proposed work enumerated in the scope of work letter from its contractor dated January 25, 2021; that plaintiff’s submission of materials in support of its request for consent to defendant to perform the proposed work fully complied with the lease agreement, in particular Article 3 of same; that defendant has failed to respond to plaintiff’s request and does not have any legitimate basis for withholding its written consent to the proposed work; that an actual justiciable controversy exists between the parties for which plaintiff seeks an adjudication in accordance with section 3001 of the CPLR, declaring that the proposed work is permitted pursuant to Article 3 of the lease agreement and that defendant has no legitimate basis for withholding its consent. (NYSCEF Doc. Nos. 1-2, *summons and complaint*).

Plaintiff now moves the court for an order restoring the instant action to the court’s calendar pursuant to the stipulation of settlement dated May 21, 2022, entered into between the parties, which it annexes to the moving papers (NYSCEF Doc. No. 16, *stipulation of*

*settlement*).<sup>1</sup> It also seeks an order, pursuant to CPLR 3025, for leave to amend the complaint to add a cause of action for commercial tenant harassment under of the Administrative Code of the City of New York § 22-902(a)(1), (a)(10), and (a)(13). (NYSCEF Doc. No. 11, *notice of motion*). In support of its application, plaintiff submits, *inter alia*, the affidavit of its president, Emanuel Kaliontzakis, wherein he sets forth the allegations that plaintiff relies upon to contend that defendant has engaged in commercial tenant harassment against plaintiff in connection to the South Store and North Store. (NYSCEF Doc. No. 13, *Kaliontzakis affidavit*). Kaliontzakis, as repeated in the proposed verified pleadings, asserts the following:

“a. On or about December 8, 2021, Defendant’s Board Member, Charles Lane, followed the contractors working on the South Store while taking video of them with a phone and saying ‘I thought you weren’t coming back’;

b. On or about December 5, 2021, several of Defendant’s Board Members followed a contractor working on the South Store while taking video of him inside said premises and they refused to leave until the contractor said that he will not come back to the subject premises;

c. On or about December 5, 2021, several of Defendant’s Board Members told everyone present at the South Store that Plaintiff owes money and that all the construction at said premises is illegal;

d. In or about November 2021, Defendant’s Board Members requested that work be performed on the roof, however, Plaintiff’s contractor refused to perform said work as Defendant caused a Stop Work Order to be issued and posted at or about the South Store;

e. On or about November 14, 2021, Defendant’s Board Member, Marc Freud, sent an email to Plaintiff’s principal, Emanuel Kaliontzakis, stating that ‘pitch forks are out for you, the building for its own financial well being must push you and the process of settlement and litigation – for a conclusion’;

f. On or about November 3, 2021, Defendant’s counsel sent a letter to Mr. Kaliontzakis containing false accusations and requesting that the air conditioners at the South Store be moved for a third time;

g. On or about October 29, 2021, Defendant sent a letter to Mr. Kaliontzakis, and posted it on the front door to the building where the demised premises is located, falsely stating that the work being performed at the South Store is illegal and demanding that said work stop;

h. On or about October 25, 2021, upon information and belief, Defendant called the FDNY when Plaintiff was removing an oil tank at the South Store, and, at the same time,

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<sup>1</sup> Before interposing an answer in this action, the parties entered into a settlement agreement in May 2021 (NYSCEF Doc. No. 16, *stipulation of settlement*). However, same was not filed with the court.

Defendant's Board Member, Charles Lane, was yelling and screaming at Mr. Kaliontzakis;

i. In or about July 2021, Defendant's counsel sent a list of items it believed to be illegal to Plaintiff's subtenant at the South Store, however, upon information and belief, the enumerated items have existed for the past thirty (30) years, and this is simply an attempt to thwart Plaintiff's subtenant from obtaining a license from the New York State Liquor Authority;

j. On or about June 9, 2021, upon information and belief, several of Defendant's Board Members attended a Community Board Meeting and made false statements at said meeting and in writing to the Community Board, to wit: Plaintiff is not allowed to sublease the North Store or apply for a license from the New York State Liquor Authority;

k. On January 5, 2021, Plaintiff requested that the Work be performed at the South Store, however, without any reason whatsoever, Defendant refused to review the proposed Work;

l. On or about December 5, 2020, upon information and belief, several of Defendant's Board Members attended a Community Board Meeting and made false statements at said meeting and in writing to the Community Board, to wit: Plaintiff is not allowed to sublease the South Store or apply for a license from the New York State Liquor Authority. As a result, Plaintiff's subtenant for the South Store demanded that Plaintiff return their deposit and void the sublease;

m. In or about September 2020, Defendant's Board Members approached Plaintiff's subtenants at the South Store and North Store and demanded that said subtenants pay Defendant and not Plaintiff;

n. In or about May 2020, Defendant's Board Member, Marc Freud, sent a threatening email to Mr. Kaliontzakis demanding that Plaintiff sign a new lease for the South Store, to wit: 'Certain Board Members want your lease and are pushing for no settlement – I am sure you can guess who – this is not good cop/bad cop – I am being candid';

o. In or about May 2020, upon information and belief, Defendant's Board Member, Marc Freud, contacted a potential subtenant of Plaintiff, a hardware store, and dissuaded it from entering into a sublease with Plaintiff for the South Store. As a result, said potential subtenant leased a space down the block;

p. In or about April 2020, Defendant's Board Member, Marc Freud, requested Plaintiff's proof of insurance for the South Store (which was in full force and effect) and stated that if same was not produced Plaintiff would need to sign a new lease or be evicted.

- q. In or about May 2019, while Plaintiff's subtenant in the North Store was painting, Defendant's Board Member, Charles Lane, appeared unannounced with Defendant's counsel yelling and screaming that the painting was illegal;
- r. In or about April 2019, Plaintiff had workmen come to the South Store to repair a fan and clean ducts, however, said workmen were thrown out of the building by several of Defendant's Board Members;
- s. In or about March 2019, Defendant's Board Member, Charles Lane, sent a text to an employee of Plaintiff's subtenant in the South Store stating it would be evicted without any authority or basis to do so;
- t. In or about November 2018, Defendant, via its Board Members, sent an email threatening Plaintiff that if it did not sign a new lease, it would face eviction;
- u. In or about August 2018, Defendant, via its Board Members, sent a frivolous notice fabricating items that purportedly needed to be cured by Plaintiff, which was simply false; and
- v. In or about February 2018, Defendant, via it[s] Board Members, sent an email threatening Plaintiff that if [it] did not sign a new lease, it will commence a lawsuit as it believes that Plaintiff illegally installed an air conditioner even though there is no merit to this accusation." (NYSCEF Doc. Nos. 13, *Kaliontzakis affidavit*; 19 ¶¶ 27, *proposed amended complaint*).

In opposition to plaintiff's motion, defendant argues that that branch of the motion seeking to restore this matter to the court's calendar is procedurally defective because the subject stipulation was never filed with the court and, thus, the action was never deemed dismissed or disposed. Furthermore, it contends that plaintiff fails to establish its entitlement to an amendment of the complaint pursuant to CPLR 3025(b), because "the [l]andlord's actions with respect to the written lease agreements for the [p]remises are motivated by a desire to ensure the [t]enant adheres to state and local laws, as well as written agreements, and to protect the health and safety of the [l]andlord's residents". Thus, defendant maintains that plaintiff's claim of commercial tenant harassment is patently devoid of merit. Defendant also contends that, although plaintiff attempts to assert violations under subsections (a)(1), (a)(10) and (a)(13) of the commercial tenant harassment law, the amended complaint does not identify any instance of force or threat by the landlord so as to assert a claim under 22-902(a)(1); plaintiff does not allege interference with the operation of its business, therefore, any claim under 22-902(a)(10) is inadequately pleaded; a claim premised on 22-902(a)(13) also does not lie because plaintiff did not have written consent to perform the work in question and, the work actually agreed to in the stipulation of settlement, was not performed.

Under New York City Administrative Code § 22-902, "commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other

rental agreement or under applicable law in relation to such covered property, and (ii) includes one or more of the following:

1. using force against or making express or implied threats that force will be used against a commercial tenant or such tenant's invitee;
10. engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business;
13. unreasonably refusing to cooperate with a tenant's permitted repairs or construction activities."

As a preliminary matter, this court notes that the settlement stipulation executed between the parties was never filed with the court and the action was never marked discontinued or dismissed. Thus, that branch of motion seeking to restore this matter is denied.

Turning next to the motion to amend the complaint, while this court notes that there is no redlined version of the proposed amendment, nor are the changes in italicized font or boldface, this court exercises its discretion to disregard plaintiff's non-prejudicial mistakes (See CPLR 2001; *Demonte v City of NY*, 2016 NY Slip Op 31092[U], \*\*3-4 [Sup Ct, NY County 2016].) "Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise." (*Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523, 523 [1st Dept 2019] [internal quotation marks and citations omitted].) Therefore, a motion to amend the pleadings should be denied only if the pleadings are patently insufficient or clearly devoid of merit. (See *Yu Tian Li v Louie & Chan Rest.*, 170 AD3d 424, 425 [1st Dept 2019].) Here, although defendant takes issue with the allegations asserted in the proposed cause of action, the court shall not decide the merits of the proposed pleadings on this application (See *Henry v Split Rock Rehabilitation & Health Care Ctr., LLC*, 205 AD3d 540, 541 [1st Dept 2022]; *Bonoff v Troy*, 187 AD2d 302, 303 [1st Dept 1992]) and, upon a review of the proposed pleadings and after applying the liberal standard of CPLR 3025(b), this court grants that branch of the motion seeking to amend the complaint, in the form annexed to the moving papers (NYSCEF Doc. No. 19, *amended complaint*). Accordingly, it is hereby

**ORDERED** that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc. No. 19) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

**ORDERED** that that branch of the motion seeking to restore this case to the court's calendar is denied as defective; and it is further

**ORDERED** that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within twenty (20) days from the date of said service; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

**ORDERED** that counsel are directed to appear for a preliminary conference on September 27, 2023, details which shall be provided by the court no later than September 25, 2023.

This constitutes the decision and order of this court.

July 18, 2023

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE