

MAN 441 LLC v Zimmerman

2023 NY Slip Op 33915(U)

November 2, 2023

Supreme Court, New York County

Docket Number: Index No. 152325/2022

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

MAN 441 LLC,

Plaintiff,

- v -

STANLEY ZIMMERMAN, DAVID ZIMMERMAN

Defendant.s

-----X

INDEX NO. 152325/2022

MOTION DATE 04/13/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 37

were read on this motion to/for RENEWAL.

In this commercial landlord/tenant action plaintiff Man 41, LLC moves pursuant to CPLR § 2221 (e) for leave to renew the defendant’s previously granted motion to dismiss (NYSCEF Doc No 23). Plaintiff alternatively moves pursuant to CPLR § 5015(a)(5) to vacate the judgement.

BACKGROUND

Plaintiff commenced this action against defendants seeking monetary damages for the past rent due (Summons & Complaint; NYSCDEF Doc No 1). Plaintiff as landlord, and Sammy Schmul, Inc. as tenant executed a lease for property located at 157 Chrystie Street, New York, NY on June 1, 2016. In connection with the lease defendants executed a guaranty agreement in which they guaranteed “all the agreements to be performed and observed by Tenant in the Lease” (Affidavit in Support of Motion to Dismiss, NYSCEF Doc No 5). The tenant operated a restaurant at the premises until March 2020 where they were forced to close temporarily due to COVID-19 restrictions. The tenant was eventually able to reopen at a limited capacity but ultimately it ceased operations and vacated the premises in March 2021.

Plaintiff brought this action to enforce the Guaranty Agreement and recover the unpaid rent following the tenant's default. Defendants moved for dismissal arguing they were protected under NYC Administrative Code § 22-1005. Section 22-1005 bars enforceability against a natural person guarantor provided that two conditions are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
 - (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;
 - (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or
 - (c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.
2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.

By decision and order dated September 23, 2022, the complaint was dismissed on the grounds that defendants were protected by NYC Administrative Code § 22-1005. Plaintiff now moves to renew their motion in light of a recent Southern District of New York decision holding that NYC Administrative Code § 22-1005 is unconstitutional because it violates the Contracts Clause of the United States Constitution (*Melendez v City of New York*, 2023 WL 2746183, [SD NY 2023]).

DISCUSSION

Pursuant to CPLR § 2221 (e) (2) a motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” “A motion for leave to renew based upon an alleged change in the law must be made prior to the entry of a final

judgment, or before the time to appeal has fully expired” (*160 E. 84th St. v New York State Div. of Hous. and Community Renewal*, 203 AD3d 501 [1st Dept 2022]). “CPLR 2221(e) did not change the rule regarding the finality of judgments” (*Id.*). Pursuant to CPLR § 5513, “[a]n appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.”

The Court of Appeals has considered whether “motion for reargument made after the expiration of the time to appeal [should be granted] on the sole ground that, in the interim, an appellate court has overruled its own or another statement of existing law” and has determined that it should not (*In re Huie*, 20 NY2d 568, 572 [1967]). “[T]his result might at times seem harsh, there must be an end to lawsuits and the time to take an appeal cannot forever be extended” (*Id.*). The court may make an exception to this when “the sort of circumstances mentioned in CPLR 5015, [are present, but] “a determination of a court from which no appeal has been taken ought to remain inviolate” (*Id.*).

Here, this court granted Defendants’ motion to dismiss the action as barred by the Guaranty Law (NYSCEF Doc No 23) and defendants filed a Notice of Entry of the Judgement on October 6, 2023 (NYSCEF Doc No 26). Plaintiffs did not file an appeal and did not file the current motion to renew until April 13, 2023 over 6 months after the Notice of Entry was filed. Because plaintiff did not appeal within the allotted time period the motion to renew is untimely.

Nor are the circumstances in this case the type that meet the exceptions outlined in CPLR § 5015. CPLR § 5015 allows relief from a final judgement on the following grounds:

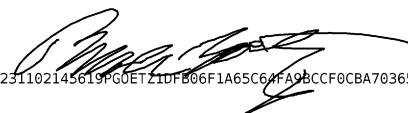
1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have

- been discovered in time to move for a new trial under section 4404;
- or
- 3. fraud, misrepresentation, or other misconduct of an adverse party;
- or
- 4. lack of jurisdiction to render the judgment or order; or
- 5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

A change in the law is not among the grounds which allow for relief from a judgement under CPLR § 5015 and the grounds that do warrant such relief are not present in this case.

Plaintiff argues that CPLR § 2221(e) is flexible and relief may be granted in the court’s discretion and in the interests of justice. Plaintiff cites a Fourth Department case that allowed a motion to renew even though the motion for renewal was made four years after the Court’s initial ruling. (*Palmer v County of Erie*, 99 AD3d 1206 [4th Dept 2012]). However, in *Palmer* the motion that the movant sought to renew did not result in a final disposition. (*See* Brief for Defendant-Appellant County of Erie in Appeal Nos. 1 and 2., 2012 WL 13169369, at *13 [4th Dept]). In *Palmer* summary judgement was denied but the case was not yet disposed. (*Id.* at *14). While the plaintiffs awaited trial a subsequent change in law occurred which allowed them to renew their summary judgement motion. (*Palmer*, 99 AD3d at 1207).

Here on the other hand, when defendant’s motion for dismissal was granted, the case was disposed. Since this resulted in a final judgement, the flexibility of some time constraints on a CPLR § 2221 (e) motion do not apply.



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11/2/2023		
DATE	PAUL A. GOETZ, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE