

**APF 28 W 44 Owner L.P. v Dasha Wellness Corp.**

2023 NY Slip Op 34057(U)

November 15, 2023

Supreme Court, New York County

Docket Number: Index No. 156558/2020

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS PART 39TR**

*Justice*

-----X

APF 28 W 44 OWNER L.P.,

Plaintiff,

- v -

DASHA WELLNESS CORP., SHANNON POLLACK,  
DARREN POLLACK

Defendant.

-----X

**INDEX NO.** 156558/2020  
**MOTION DATE** N/A  
**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 42, 43, 44, 45, 46, 47 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff is the landlord of the building known as 28 west 44<sup>th</sup> Street, New York, New York 10036. By commercial lease agreement dated as of November 12, 2013, plaintiff leased a portion of the third floor of the building to defendant Dasha Wellness Corp. as tenant. On October 8, 2012, defendants Shannon Pollack and Darren Pollack each executed guarantees of the lease. Plaintiff commenced this action in August 2020, seeking damages for rent and additional rental arrears arising from defendants' alleged breach of the lease and guaranties. Plaintiff now moves pursuant to CPLR 3212 for summary judgment against defendants; pursuant to CPLR 3025(c) for leave to amend the Verified Complaint to conform to the evidence proffered on this motion; pursuant to CPLR 3211(b) to dismiss defendants' affirmative defenses; and an award of attorneys' fees. Defendants oppose the motion.

It is well-settled that “the proponent of a summary judgment motion 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. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). In addition, the party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521 (1<sup>st</sup> Dep’t 1989). Summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf*, 153 A.D.2d at 522. Further, the standard of review on a CPLR 3211(b) motion to dismiss an affirmative defense is “whether there is any legal or factual basis for the assertion of the defense.” *Matter of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 67 (1<sup>st</sup> Dep’t 1988).

Here, viewing the evidence in a light most favorable to the non-moving parties, plaintiff has made a *prima facie* showing of entitlement to summary judgment, and defendants fail to raise factual issues sufficient to defeat the motion. Significantly, defendants proffer no evidence to support their contention that there are admitted “errors” in plaintiff’s calculation of rent and arrears. Nor are defendants’ affirmative defenses viable as a matter of law. For example, the defense of impossibility or impracticability are inapplicable here. The doctrine of impossibility or impracticability generally applies where performance is prevented by “the destruction of the means of performance by an act of God, *vis major*, or by law [citations omitted].” *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). “. . . [W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused [citations omitted].” *407 E. 61st Garage, Inc.*, 23 N.Y.2d at 281. Furthermore, the defendant guarantors cannot rely on New York City Local Law § 1932-A, which is codified as New York City Administrative Code §

22-1005 and known as the “Guaranty Law.” Even if defendant tenant’s business did not qualify as an “essential business,” exempting it from the pandemic-era retail closure orders, the Guaranty Law was held to be unconstitutional by a Federal court in New York, which found that the Guaranty Law violates the Contracts Clause. *See Melendez v. City of New York*, 2023 WL 2746183 (S.D.N.Y. March 31, 2023). Although the Appellate Division has yet to rule on the Guaranty Law’s constitutionality, the reasoning in *Melendez* has already been adopted by the Supreme Court. *See Kensington House NY LLC v. Nicholas Emil Accardi* (Sup. Ct., New York County, May 17, 2023, Bluth, J., Index No. 651365/2022); *see also Robert T. Iannucci et ano. v. Prime Four Inc. d/b/a Forno Rosso, et al.* (Sup. Ct. Kings County, July 27, 2023, Boddie, J., Index No. 527321/2021). This court agrees that the reasoning in *Melendez* is thorough and sound, and should apply to the instant action.

Finally, defendants argue that plaintiff’s motion is defective for failure to provide a separate Statement of Material Facts pursuant to 22NYCRR § 202.8-g(a). However, this court’s Part Rules do not require such a statement. Moreover, plaintiff set forth the material facts of this matter giving defendants sufficient opportunity to respond thereto. *See Birds & Bubbles*, 74 Misc. 3d 1212(A) at \*1.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted and defendants’ affirmative defenses are dismissed, and pursuant to CPLR 3025(c) the Verified Complaint herein is amended to conform to the evidence; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff APF 28 W 44 OWNER L.P., and against defendant DASHA WELLNESS CORP., in the amount of \$725,795.50, plus interest thereon at the statutory rate from July 1, 2019, through the date of entry of judgment, as

calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff APF 28 W 44 OWNER L.P., and against defendants SHANNON POLLACK and DARREN POLLACK, jointly and severally, in the amount of \$186,993.40, plus interest thereon at the statutory rate from July 1, 2019, through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff APF 28 W 44 OWNER L.P., and against defendants DASHA WELLNESS CORP, SHANNON POLLACK and DARREN POLLACK, jointly and severally, for attorneys' fees in the amount of \$28,440.09.

This constitutes the decision and order of the court.

11/15/2023

DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: