128 Second Realty LLC v Toscana Pizza Inc.
2024 NY Slip Op 32713(U)
August 1, 2024
Supreme Court, New York County
Docket Number: Index No. 654541/2020
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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128 SECOND REALTY LLC, STELLAR 128 SECOND LLC,

Plaintiffs,

- v -

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

Defendants.

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INDEX NO. 654541/2020

MOTION DATE 07/31/2024

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiffs' motion for summary judgment on its first and fifth causes of action is granted as described below.

Background

Defendant Toscana Pizza Inc. dba Nolita Pizza (the "Tenant") entered into a ten-year lease on May 28, 2019 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 the individual defendants executed 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.

This Court previously granted plaintiff's cross-motion for summary judgment on liability against the Tenant (NYSCEF Doc. No. 65) and dismissed defendants' counterclaims (NYSCEF Doc. No. 154).

Plaintiffs now move for summary judgment against the Tenant and defendants Rodriguez, Keraj and Salihaj. They point out that the individual defendants signed guarantees in connection with the aforementioned lease. Plaintiffs insist that defendants do not have a cognizable defense as this Court dismissed their counterclaim for wrongful eviction. They also argue that the guarantor exemption law passed during the height of the COVID-19 pandemic has been struck down by a federal court and so the individual defendants are liable. Plaintiffs seek summary judgment on their first and fifth causes of action and seek $397,631.82.

In opposition, defendants admit that the Tenant entered into a lease dated May 28, 2019 and that the individual defendants signed guarantees in connection with this lease. They contend that the COVID-19 pandemic and executive orders requiring restaurants to close, such as the pizza establishment run by defendants, were unanticipated events that made performance impossible. Defendants also contend that attempted to return the keys to plaintiffs in order to prematurely leave the premises. However, they argue that plaintiffs then changed the locks without the defendants returning the keys or providing a written surrender.

Defendants argue that the instant motion should be denied as plaintiffs failed to include a statement of material facts as required by this state's uniform trial court rules. They also claim that the rent ledger attached by plaintiffs is not in admissible form as no one with personal knowledge attests to the amounts. Defendants insist that the bar on collecting rent against guarantors during the pandemic should be enforced in spite of the federal court decision striking it down.

In reply, plaintiffs point out that the uniform rules concerning the statement of material facts was amended years ago and is therefore not a basis to deny the instant motion. They argue that the moving affidavit is from the managing principal of the landlord, who is therefore entitled to attest to the rent ledger. Plaintiffs also contend that the guarantor law is invalid and that this Court has previously addressed this specific issue.

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, 955 NYS2d 589 [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 grants the motion. As an initial matter, defendants' contention that the motion should be denied because plaintiffs failed to include a statement of facts is wholly without merit. This rule, 22 NYCRR 202.8-g was amended nearly two years ago and now permits a Court to require such a statement, but it is no longer a requirement for moving parties in every case (*see Taveras v Inc. Vil. of Freeport*, 225 AD3d 822, 823, 207 NYS3d 620 [2d Dept 2024]). This Court did not mandate such a submission here.

Defendants' other arguments are similarly without merit. The affidavit of Mr. Lowenberg, the managing principal for plaintiffs (NYSCEF Doc. No. 171), satisfies plaintiffs' prima facie burden in this motion. Mr. Lowenberg swears to the assertions in his affidavit, which attaches the rent ledger. He also observes that this rent ledger was prepared "utilizing the books and records of [the] Landlord maintained in the ordinary course of business" (*id*. ¶ 15). There is little doubt that this affidavit satisfies plaintiffs' burden (*see 14 E. 4th St. Unit 509 LLC v Toporek*, 203 AD3d 17, 23, 159 NYS3d 419 [1st Dept 2022] [discussing affidavit from landlord]). Moreover, defendants do not dispute the specific amount in the rent ledger; that is, they do not contend that plaintiffs failed to credit certain payments.

Defendants' arguments relating to the COVID-19 guarantor law, Administrative Code § 22-1005, do not compel the Court to grant the instant motion. This provision "provides immunity from the enforcement of certain commercial lease guaranties where personal liability arose (1) as a result of the pandemic-related executive orders affecting the tenant's business and (2) fell within the statutory period of March 7, 2020 to June 30, 2021" (*3rd and 60th Assoc. Sub LLC v Third Ave. M & I, LLC*, 199 AD3d 601, 601 157 NYS3d 434 [1st Dept 2021]). A federal court ruled that these protections were unconstitutional (*see Melendez v City of New York*, 20-CV-5301 (RA), 668 FSupp3d 184, 2023 WL 2746183 [SD NY 2023]).

This Court sees no reason to depart from the reasoning in *Melendez*. Among the reasons for the federal court's conclusion were that the law did not consider need (such as a hardship requirement for guarantors) and that the City did not "justify its decision to exclusively allocate the burden on landlords" (*id*. at 204). The Court also noted that this law did not temporarily impair these contracts (the guarantees) but instead permanently extinguished a guarantor's obligation (*id*. at 200). Accordingly, the Court will enforce the guarantees.

Defendants' assertion that a First Department case held otherwise is without merit. In *45-47-49 Eighth Ave. LLC v Conti*, 220 AD3d 473, 474 [1st Dept 2023], the First Department simply remanded the issue back to the trial court so that "the parties can further develop the record . . . for the purpose of applying the Contracts Clause test." There was no finding that a landlord was prevented from obtaining summary judgment under these circumstances. Defendants did not make any arguments as to why the *Melendez* decision should be ignored with respect to the merits or make any substantive arguments about the provision's interplay with the Contracts Clause. Instead, defendants merely argued that the *Melendez* case is not binding on this Court.

Defendants' remaining arguments are also without merit. For instance, this Court has already found that closures due to the pandemic did not justify the non-payment of rent (NYSCEF Doc. No. 65 at 5). And the Court also rejected defendants' claims concerning a purported self-help eviction (NYSCEF Doc. No. 154 at 4). The Court observes that plaintiffs are only moving for summary judgment on their first and fifth claims and so the remaining causes of action remain.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted to the extent that the Clerk is directed to enter judgment in favor of plaintiffs and against defendants Toscana Pizza Inc. dba Nolita Pizza, Ivan Hernandez Rodriguez, Tonin Keraj and Dritan Salihaj jointly and severally, in the amount of $397,631.82 plus interest at the contractual rate of ten percent from April 1, 2022 (a reasonable midpoint) upon presentation of proper papers therefor; and the remaining causes of action are severed and shall continue.

8/1/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**