

Renaissance Midtown W. LLC v Lividini & Co. LLC

2025 NY Slip Op 33004(U)

July 24, 2025

Supreme Court, New York County

Docket Number: Index No. 659242/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

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RENAISSANCE MIDTOWN WEST LLC,
Plaintiff,

- v -

LIVIDINI & COMPANY LLC, JACQUI LIVIDINI
Defendant.

-----X

INDEX NO. 659242/2024

MOTION DATE 03/31/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS.

This action arises out the alleged breach of a commercial lease agreement. Defendants now move, pursuant to CPLR §3211 (a)(1) and (a)(7), to dismiss the complaint. Plaintiff opposes. For the reasons set forth below, the motion is granted in part.

Background

The parties entered into a commercial lease agreement for the entire 19th floor, and later the 20th floor, at 264 West 40th Street, New York, New York. The lease term was from November 1, 2012, and expiring on October 31, 2022. In November 2019, the parties extended the lease through December 31, 2024.

The complaint alleges that defendants breached the lease by vacating the premises in August 2020. Although plaintiff subsequently relet the premises, the base rent for the new tenant was less than the rent due from defendants. Defendants contend that, pursuant to the terms of the lease, it properly sent a surrender letter and did not receive any notice from the plaintiff rejecting defendant’s surrender.

Legal Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. “The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.” *Id.*

“In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

Discussion

Preliminarily, the portion of defendants’ motion that seeks dismissal of the complaint as against the individual defendant, Jacqui Lividini is granted. The complaint alleges that the individual defendant is liable pursuant to the lease guaranty, however, does not allege that the individual defendant executed a lease guaranty, nor does plaintiff annex the lease guaranty. In fact, in opposition to the underlying motion the plaintiff states that the guaranty cannot be

located and “is currently being searched for.” To be clear, the Court does not find that the individual defendant’s affidavit morphed the standard on this motion to dismiss and agrees with plaintiff that the affidavit is insufficient as documentary evidence. Rather, the Court finds that the complaint fails to adequately allege a cause of action against the individual defendant for breach of a guaranty.

Moreover, the complaint does not contain factual allegations to pierce the corporate veil. The concept of “piercing the corporate veil” is a limitation on accepted principles that corporation exists independently of its owners as a separate legal entity, that owners are normally not liable for debts of corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of corporate owners. *Morris v New York State Dep’t of Tax’n & Fin.*, 82 NY2d 135 [1993]. Although there are no definitive rules governing circumstances when corporate veil may be pierced, there is generally required showing that: (1) owners exercised complete domination of corporation in respect to transaction attacked; and (2) such domination was used to commit fraud or wrong against plaintiff which resulted in plaintiff’s injury. *Id.* Further, it has been held by the Court of Appeals that, at the pleading stage, a plaintiff seeking to pierce the corporate veil must adequately allege the existence of a corporate obligation and that the defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice. *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018]. Accordingly, the complaint is dismissed in its entirety as against the individual defendant.

The portion of the motion that seeks dismissal of the complaint based on defendant’s alleged proper surrender of the premises is denied. Defendant contends that it was allowed to terminate the lease, and that plaintiff was required to provide notice to defendants of a default,

upon its decision not to accept the lease surrender. Defendant offers an email, that informed plaintiff of the surrender, and the lease as the documentary evidence to rebut the allegations in the complaint. Additionally, defendant cites to First Department case law that stands for the proposition that plaintiff's conduct is consistent with an acceptance of the surrender,

First, the email is not documentary evidence, thus the Court will not rely on it as a basis for dismissal. The lease, however, is documentary evidence that creates a factual issue and prevents disposition of this matter on this issue at the pleading stage. While there is no dispute that the conduct by plaintiff, as alleged in the complaint, is consistent with factual scenarios where the First Department has found an acceptance of surrender, *see Bay Plaza Estates, Inc. v New York Univ.*, 257 A.D.2d 472, 473 [1st Dept 1999], the Court finds that at this juncture the record is undeveloped and it is inappropriate to grant dismissal at the pleadings stage as to this issue, especially where here the lease provides that plaintiff may re-let the premises upon defendant's default or dispossess pursuant to a summary proceeding.

The Court now turns to the argument that plaintiff was required to provide notice of tenant's default, here the alleged improper surrender, to allow defendant an opportunity to cure. In opposition to this argument, plaintiff contends that notice is only required when it is the landlord that seeks to terminate the lease, however the plain reading of the lease does not support that interpretation. Section 17 specifically reads, "if the tenant defaults [...] or if the demised premises becomes vacant" then owner must provide written notice "specifying the nature of said default" *see* NYSCEF Doc. 3, p.44. Further, if tenant fails to cure with the 5-day period prescribed the notice then landlord shall serve a written 3-day notice, terminating the lease and tenant remaining liable thereunder. *Id.*

Here, the Court finds based on the pleadings and documentary evidence, that plaintiff failed to provide written notice and an opportunity to cure the default as required by the lease. Plaintiff does not dispute that it did not provide notice, rather it contends that it is not required in this situation; the Court does not agree based on the explicit terms of the lease discussed above. Accordingly, it is hereby

ORDERED that the complaint is dismissed in its entirety.

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7/24/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE