

Daper Realty, Inc. v Pizzimenti

2025 NY Slip Op 34837(U)

December 15, 2025

Supreme Court, New York County

Docket Number: Index No. 155325/2020

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 42M

-----X
 DAPER REALTY, INC.

Plaintiff,

- v -

CHRISTOPHER PIZZIMENTI,

Defendant.

INDEX NO. 155325/2020

MOTION DATE 02/21/2025

MOTION SEQ. NO. 005

**DECISION + ORDER ON
 MOTION**

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD

APPEARANCES:

Kucker Marino Winiarsky & Bittens, LLP, New York, New York
 (Evelyn P. Flores Esq., of counsel) for plaintiff.

Jimmy Wagner, Attorney at Law, Brooklyn, New York (Jimmy F.
 Wagner, Esq. of counsel) for defendant.

HON. EMILY MORALES-MINERVA:

In this action for breach of a guaranty, plaintiff DAPER REALTY, INC. moves -- post judgment -- for, among other things, an order vacating the money judgment entered on December 12, 2023 against defendant CHRISTOPHER PIZZIMENTI (see CPLR § 5015 [a] [governing relief from a judgment or order, upon motion], and, upon vacatur of said money judgment, granting leave to amend the damages clause of its complaint. Defendant appears and submits opposition.

For the reasons explained below, the Court denies plaintiff's motion (seq. no. 05) entirely.

BACKGROUND

Plaintiff DAPER REALTY, INC. (owner/landlord) is the owner and landlord of a commercial property located at 1089 Second Avenue, New York, New York 10002 (see New York State Court Electronic Filing System [NYSCEF] Doc. No. 01, complaint). On September 09, 2014, non-party Al Horno Lean Mexican 57, Inc. (tenant) and owner/landlord entered into a ten-year commercial lease for the ground floor and basement of the premises (see id.). Said commercial lease included a "Good Guy Guaranty", in which defendant CHRISTOPHER PIZZIMENTI (guarantor) personally guaranteed the commercial lease obligations of tenant, including tenant's monetary obligations (see NYSCEF Doc. No. 14, guaranty, dated September 09, 2014).

Tenant failed to pay rent from February 2020 through July 2020, and guarantor did not cover tenant's obligation under the lease. Consequently, owner/landlord commenced this action on July 14, 2020 against guarantor for breach of the guaranty agreement, seeking payment of rental arrears, additional rent, and attorneys' fees (see NYSCEF Doc. No. 01, complaint). Specifically, owner/landlord alleged that "[t]he totality of the

rent and additional rent due now through July 30, 2020 is \$135,673.92, exclusive of billed attorneys' fees []" (id.). However, plaintiff did not seek the totality of the amount due, and instead clarified that "pursuant to New York City Administrative Code 1932-A, plaintiff is only seeking to recover such liabilities prior to March 07, 2020" (id.). Accordingly, plaintiff sought damages in the "sum of \$58,199.89" (id.).¹

Guarantor answered on September 10, 2020 (see NYSCEF Doc. No. 03, answer). In the meanwhile, on August 20, 2021, owner/landlord commenced a separate action against tenant Al Horno Lean Mexican 57, Inc. (see Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc., Index No. 655100/2021).

On August 31, 2021, owner/landlord moved, by order to show cause (mot. seq. no. 01), pursuant to CPLR § 3212, for an order granting it, among other things, summary judgment against guarantor, seeking damages in the amount of \$58,199.89 (see NYSCEF Doc. No. 09, 25, order to show cause). Guarantor opposed, and subsequently moved, by notice of motion (seq. no. 02), to amend his answer (NYSCEF Doc. No. 37, notice of motion).

¹ Specifically, plaintiff alleges that it is "only demanding recovery of the sum of \$58,199.89 in this Action without prejudice to the balance of \$77,474.04 that has accrued since March 7, 2020, attorneys' fees that have accrued to date and all sums that shall become due in the future during the balance of the Lease and the Rider. Plaintiff reserves all rights, claims and causes of action with respect to sums accrued and/or that will accrue between March 7, 2020 and September 30, 2020 and/or attorneys' fees that have accrued and will continue to accrue in preparing for and commencing this Action and all sums that shall become due in the future during the remaining term of the Lease and Rider" (NYSCEF Doc. No. 01, complaint, paragraph 14).

On November 18, 2021 -- while the motions in the instant action remained pending -- owner/landlord moved for summary judgment against tenant Al Horno Lean Mexican 57, Inc. in the related action, and sought to consolidate that action with the instant one (see Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc., Index No. 655100/2021, NYSCEF Doc. No. 12, notice of motion). Thereafter, the court (N. Bannon, J.S.C.) granted owner/landlord an order of summary judgment against tenant, referred the issue of damages to a Special Referee, and denied plaintiff's request for consolidation "in light of the disposition of substantially all of the claims in this case" (see id., NYSCEF Doc. No. 71, decision and order, dated October 05, 2022).

On October 19, 2023 -- approximately one year after the court's (N. Bannon, J.S.C.) decision and order in the related action -- the court (N. Bannon, J.S.C.) granted owner/landlord's motion, by order to show cause (seq. no. 01), for summary judgment in the instant action, and directed judgment in favor of owner/landlord and against guarantor "in the sum of \$47,226.89" (NYSCEF Doc. No. 64, decision and order, dated October 19, 2023). In the same order, the court (N. Bannon, J.S.C.) denied guarantor's motion to amend his answer (see id.).

Owner/landlord then submitted a proposed money judgment to the clerk of the court (see NYSCEF Doc. No. 67, proposed

judgment), who entered judgment on December 12, 2023, in favor of owner/landlord and against guarantor "in the sum of \$47,226.89, with interest calculated at 9% per annum from February 1, 2020 on the principal sum of \$47,226.89, in the amount of \$16,419.43 together with costs and disbursements . . . amounting to the sum of \$64,196.32" (NYSCEF Doc. No. 70, judgment, dated December 12, 2023). Thereafter, the instant action was disposed.

A few months later -- in owner/landlord's related action against tenant -- the court (N. Bannon, J.S.C.) confirmed Special Referee Phyllis Sambuco's report and recommendation, and directed entry of judgment in favor of owner/landlord and against tenant Al Horno Lean Mexican 57, Inc. in the amount of \$1,059,925.83 (see Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc., Index No. 655100/2021, NYSCEF Doc. No. 95, decision and order, dated February 21, 2024).

Following the court's (N. Bannon, J.S.C.) decision and order in the related action, owner/landlord filed a motion (seq. no. 03) for leave to amend the damages clause of its complaint against guarantor, pursuant to CPLR § 3025 (b); to amend the complaint to conform the pleadings to the evidence, pursuant to CPLR § 3025 (c); to renew its previous motion for entry of a money judgment, pursuant to CPLR § 2221 (e); and to increase its money judgment against guarantor from the principal sum of

\$47,226.89 to \$1,059,925.83, pursuant to CPLR § 5019 (see NYSCEF Doc. No. 73, notice of motion, dated March 28, 2024). Guarantor opposed the relief requested.

The undersigned, in a decision and order, denied owner/landlord's motion entirely, holding:

"[W]here -- as here -- the clerk of the court entered and filed judgment, pursuant to CPLR §§ 5011 and 5016, and such judgment sets forth a specific amount of money -- the appropriate procedure for resolving any substantive issues is to seek vacatur of the judgment pursuant to CPLR § 5015 []. Owner/landlord fails to submit any case law or statutes permitting a different approach under the circumstances presented"

(NYSCEF Doc. No. 94, decision and order, dated October 07, 2024).

Now, owner/landlord moves, by notice of motion (seq. no. 05), for (1) an order vacating the money judgment entered on December 12, 2023, pursuant to CPLR § 5015; (2) upon vacatur of said money judgment, granting leave to amend it's complaint pursuant to CPLR § 3025 (b) and/or (c), to conform the complaint to the evidence to include all amounts due to owner/landlord by guarantor, in accordance with Special Referee Phyllis Sambuco's report and recommendation, which was subsequently confirmed by the court (N. Bannon, J.S.C); (3) upon the granting of such an amendment, granting leave to renew owner/landlord's application for a money judgment to increase said judgment against guarantor

from the principal sum of \$47,226.89 to \$1,059,925.93; and (4) entering judgment in favor of owner/landlord and against guarantor in the amount of \$1,059,925.93 (see NYSCEF Doc. No. 119, notice of motion, dated November 15, 2024).

In support of owner/landlord's application for an order vacating the money judgment entered on December 12, 2023 pursuant to CPLR § 5015, owner/landlord argues only that "vacatur of the [] judgment is warranted so that the complaint can be amended to reflect the specific findings set forth in the report and recommendation issued by the Special Referee in the related action" (id.). Owner/landlord contends that, in the interests of justice, it should not be required to initiate a new proceeding against guarantor, and face additional delays in seeking to recover the \$1,059,925.93 (see id.).

Guarantor opposes and argues that owner/landlord does not meet the requirements of law to have the December 12, 2023 judgment vacated (see NYSCEF Doc. No. 129, memorandum of law in opposition).

ANALYSIS

Section 5015 of the CPLR, governing relief from a judgment or order, provides:

"(a) The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

- (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"

([emphasis added]; see also Kasowitz, Benson, Torres & Friedman, LLP v JPMorgan Chase Bank, N.A., 43 NY3d 180, 186 n 2 [2024])).

Though there are five grounds set forth in CPLR § 5015 (a), the Court of Appeals has held that "[i]n addition to the grounds set forth in CPLR § 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (Woodson v Mendon Leasing Corp., 100 NY2d 62, 68 [2003], citing Ladd v Stevenson, 112 NY 325, 332 [1889])). Recognizing that the plain language of statute does not necessarily reflect this intention, the Court of Appeals opined that "it might have been more elegant to add an additional paragraph [to CPLR 5015(a)] as a kind of catchall category, but

the intent seems clear enough without it" (Woodson, 100 NY2d at 68, quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5015:11, at 476-477; see also Cayuga Nation v John, 239 AD3d 1287, 1288 [4th Dept 2025] ["(S)ection 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated, and courts have inherent discretionary power to vacate default judgments in situations that warrant vacatur but which the drafters of CPLR § 5015 (a) could not easily foresee"]).

When considering whether to vacate a judgment in the interests of justice, it is imperative for courts to "consider[] the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief" (State v Richard TT, 132 AD3d 72, 75 [3d Dept 2015], quoting Hodge v Dev. at Helderberg Meadows, LLC, 114 AD3d 1122 [3d Dept 2014]). Notwithstanding, CPLR § 5015 (a) is steeped in judicial discretion (see generally Nash v Port Auth. of N.Y. and N.J., 22 NY3d 220 [2013] [emphasis added]; see also Cox v Marshall, 161 AD3d 1140, 1142 [2d Dept 2018] ["[T]his discretion is reserved for unique and unusual circumstances"]).

Though owner/landlord's argument is underdeveloped, it appears that owner/landlord does not rely upon the articulated grounds set forth in CPLR § 5015 (a) to support its application

for vacatur of the December 12, 2023 money judgment.² Instead, owner/landlord seeks to invoke "the court's inherent power to vacate the money judgment in the interest of substantial justice" (Dowlah v Dowlah, 89 AD3d 675, 676 [2d Dept 2011], citing Woodson, 100 NY2d at 68).

The invocation of the court's inherent power to vacate the December 12, 2023 money judgment -- in order to restore this action to the calendar and permit plaintiff to amend its complaint, post-judgment, to seek \$1,059,925.93 in damages -- is not warranted here. Owner/landlord's claim of potential future delay is insufficiently persuasive for purposes of such relief. Further, the circumstances presented here -- the alleged inequity of having to commence a new action -- are not unique or unusual, and do not justify the exercise of this Court's discretionary power (see Cox, 161 AD3d at 1142).

"Simply stated, this is not an appropriate case in which to exercise the broad equity power of a court to vacate its own order and judgment" (Katz v Marra, 74 AD3d 888, 891 [2d Dept

² The five articulated grounds for vacatur pursuant to CPLR 5015 (a) are inapplicable here -- owner/landlord is not in default (CPLR § 5015 [a][1]; the Special Referee's report is not newly-discovered evidence (CPLR § 5015 [a][2]; see also Wall Street Mortg. Bankers, Ltd. v Rodgers, 148 AD3d 1088, 189 [2d Dept 2017] ["newly discovered evidence is evidence which was in existence . . . at the time of the original order or judgment"] [emphasis added]; Stanski v Ezersky, 250 AD2d 422, 423 [1st Dept 1998]; owner/landlord does not allege that guarantor is guilty of fraud, misrepresentation, or misconduct (CPLR 5015 § [a][3]; there is no dispute that this Court has jurisdiction over the instant matter (CPLR 5015 § [a][4]; and there have been no prior orders that have been reversed, modified or vacated (CPLR 5015 § [a][5]).

2010]; see also Astraea NYNY LLC v Ganley, 214 AD3d 528, 529 [1st Dept 2023] [holding that "defendant failed to set forth a sufficient reason to invoke the court's inherent power to vacate the default judgment in the interests of substantial justice"]]. Moreover, it is well settled that "parties to a civil dispute are free to chart their own litigation course" (Mitchell v New York Hosp., 61 NY2d 208, 214 [1984]; see also Donaldson v Port Auth. of New York and New Jersey, 240 AD3d 140, 146 [1st Dept 2025] ["[P]arties are accorded great latitude in how they conduct litigation and may to a large extent chart their own procedural course through the courts"]]).

Here, owner/landlord elected to commence the instant action against guarantor in 2020, and thereafter, to institute a separate action against non-party tenant. Owner/landlord also elected not to appeal the court's (N. Bannon, J.S.C.) denial of its motion to consolidate the two actions.

Whether these decisions were strategic or otherwise, owner/landlord sought different amounts of damages in each action -- "not less than \$500,000.00" in the action against non-party tenant (see see Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc., Index No. 655100/2021, NYSCEF Doc. No. 01, complaint), and "\$58,199.89" in the instant action against guarantor (see NYSCEF Doc. No. 01, complaint). Under these circumstances, the resulting disposition -- namely, the entry of two distinct

monetary awards in two separate proceedings -- cannot be deemed unexpected.

This Court's determination does not leave owner/landlord without recourse. Owner/landlord continues to possess a duly entered money judgment against non-party tenant in the amount of \$1,059,925.93 (see Daper Realty, Inc. v Al Horno Lean Mexican 57, Inc., Index No. 655100/2021, NYSCEF Doc. No. 100, judgment), and remains entitled to commence a new action against guarantor.

Because this Court declines to invoke its inherent power to vacate the December 12, 2023 money judgment, this Court will not address owner/landlord's application to amend its complaint in this action, which remains disposed.

Accordingly, it is hereby

ORDERED that plaintiff's motion (seq. no. 05) is denied entirely; and it is further

ORDERED that the Clerk of Court shall mark the file accordingly.

12/15/2025

DATE

Emily Morales-Minerva
EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

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

CHECK IF APPROPRIATE: