

<b>99th Ave. Holding, LLC v TSI Hell's Kitchen LLC</b>
2021 NY Slip Op 32561(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 655667/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARTHUR ENGORON PART 37**

*Justice*

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99TH AVENUE HOLDING, LLC,	INDEX NO. <u>655667/2020</u>
Plaintiff,	MOTION DATE <u>10/08/2021, 10/08/2021</u>
- v -	MOTION SEQ. NO. <u>004 004</u>

TSI HELL'S KITCHEN LLC, NEW YORK  
COMMUNICATIONS CENTER ASSOCIATES, LP, SL  
GREEN MANAGEMENT, LLC, RXR REALTY LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion for

REARGUMENT/RECONSIDERATION

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion is granted in part and denied in part and defendant's cross-motion is granted in part and denied in part.

**Background**

The relevant facts as to what remains of this lawsuit are as follows:

On or about April 20, 2015, plaintiff, 99th Avenue Holdings, LLC ("99AH"), entered into a Lease Agreement ("the Lease") with defendant New York Communications Center Associates, LP ("Landlord") to rent the premises at 350 West 50th Street, New York, New York, so as to run a fitness club called TMPL Gym ("the Gym"). NYSCEF Doc. No. 11.

On or about November 22, 2017, 99AH and defendant TSI Hell's Kitchen ("TSI HK") entered into an Asset Purchase Agreement ("the APA") for the Gym. NYSCEF Doc. No. 18.

On December 12, 2017, 99AH and TSI HK entered into an Assignment and Assumption of Lease ("the Assignment") with the consent of Landlord. NYSCEF Doc. No. 10. In Article 3(a)(i) of the Assignment all three parties agreed that 99AH was required to obtain a temporary Temporary Certificate of Occupancy ("TCO") for the Gym so that, pursuant to Article 3(b) of the Assignment, 99AH could collect a \$250,000 deposit left with Landlord ("the TCO

Security”). Id. The Assignment also provided that Landlord was authorized to use the TCO Security to satisfy any default or failure on the part of the assignee (TSI HK). Id.

On or about September 22, 2020, the New York City Department of Buildings issued the Gym a TCO, Certificate of Occupancy Number 123214690T001, effective from September 29, 2020, through December 28, 2020. NYSCEF Doc. No. 12.

Based on the delivery of the TCO, plaintiff tried to collect the TCO Security from Landlord but was rebuffed as TSI HK had defaulted on the rent. NYSCEF Doc. No. 2.

On or about October 26, 2020, 99AH commenced the instant lawsuit against TSI HK and Landlord. NYSCEF Doc. Nos. 1-2. On or about November 9, 2020, 99AH filed an amended complaint, adding SL Green Management, LLC, and RXR Realty LLC (collectively with Landlord, “Landlord Defendants”), and asserting four causes of action (breach of contract and attorney’s fees as to Landlord, and “specific performance” and “accounting” as to TSI HK). NYSCEF Doc. No. 9.

On December 3, 2020, 99AH filed an application for an Emergency Order to Show Cause seeking a temporary restraining order against TSI HK. NYSCEF Doc. No. 25. Also on December 3, 2020, Justice Nancy M. Bannon recused herself from the case due to her membership in a gym related to TSI HK. NYSCEF Doc. No. 40.

On December 9, 2020, Justice Arlene P. Bluth granted 99AH’s Emergency Order to Show Cause which, inter alia, restrained TSI HK from certain asset transfers. NYSCEF Doc. No. 42.

On December 11, 2020, 99AH filed a second Emergency Order to Show Cause seeking, inter alia, a default judgement against TSI HK and a permanent enjoining of any transfers of funds by TSI HK outside of the ordinary course of business. NYSCEF Doc. No. 43.

On December 29, 2020, Landlord answered the complaint with general denials and two-cross claims and one counterclaim. NYSCEF Doc. No. 62. Also on December 29, 2020, TSI HK cross-moved to vacate any alleged default on its behalf, grant it additional time to respond, and to dissolve the December 9, 2020, temporary restraining order. NYSCEF Doc. No. 50.

In a Reply Memorandum of Law dated January 5, 2021, 99AH announced it had “narrowed the scope of the relief sought” and “withdraws any relief specifically sought as to the Landlord.” NYSCEF Doc. No. 67. This left two causes of action in plaintiff’s Amended Complaint (for “specific performance” and for an “accounting” from TSI HK).

On January 6, 2021, Justice Bluth recused herself. NYSCEF Doc. No. 79.

In an instrument dated February 4, 2021, Landlord gave TSI HK notice that, as of February 15, 2021, the Lease was canceled due to TSI HK’s ongoing default. NYSCEF Doc. No. 92.

On February 16, 2021, the parties appeared before this Court in an online conference and this Court promptly denied 99AH's second application for an emergency order to show cause the next day. NYSCEF Doc. Nos. 103 and 96.

In an instrument dated April 16, 2021, the parties agreed to a Stipulation of Discontinuance with Prejudice, discontinuing all claims, cross-claims, and counterclaims among plaintiff, Landlord Defendants, TSI HK, and 99AH's president David Barton individually only as against Landlord Defendants. NYSCEF Doc. No. 124.

On May 10, 2021, 99AH moved for summary judgement against TSI HK as to the third cause of action in the Amended Complaint ("specific performance" for TCO Security). NYSCEF Doc. No. 100.

On or about June 1, 2021, Landlord entered into a purportedly new lease ("New Lease") for the Gym with a Delaware limited liability corporation called Empire Hell's Kitchen TMPL, LLC, (EHK TMPL) that does not appear to be licensed to do business in New York State. NYSCEF Doc. No. 118. The New Lease explicitly and extensively incorporates both the original Lease and the Assignment, annexing them as exhibits. *Id.* at 13 and 21. Twice in the New Lease EHK TMPL expressly agreed to indemnify and defend Landlord against anything to do with the instant lawsuit. *Id.* at 5 and 10.

The New Lease was signed by the CEO of EHK TMPL, Patrick Walsh ("Walsh"). NYSCEF Doc. No. 118. In addition to his role as CEO of EHK TMPL, Walsh is also the Managing Member of TSI HK where, according to an affidavit, his "duties and responsibilities include, but are not limited to, operating gymnasiums – through separate and distinct corporate entities – unrelated to TSI HK LLC throughout the country, creating corporate entities to operate the various leaseholds, and negotiating leases and asset purchase agreements." NYSCEF Doc. No. 59.

In a reply affirmation dated June 14, 2021, plaintiff withdrew its fourth cause of action seeking an accounting from TSI HK. NYSCEF Doc. No. 120.

On June 9, 2021, TSI HK cross-moved for summary judgement against 99AH. NYSCEF Doc. No. 110. In a Memorandum of Law in support of that cross-motion, TSI HK's counsel argued that as "on June 8, 2021, *TSI and the Landlord* executed a new lease" and, as the "allegations in this case are based on a prior lease agreement between TSI and Landlord that is no longer in effect," the case was moot. NYSCEF Doc. No. 119 at 6 (emphasis added).

In a Decision and Order dated July 15, 2021, this Court found that TSI HK had breached its obligations under the APA; granted 99AH's motion for summary judgement on its third cause of action to the extent of awarding 99AH \$250,000 in damages; and denied TSI HK's cross-motion.

On August 18, 2021, 99AH filed the instant scattershot motion seeking: (1) pursuant to CPLR 2221(2), reargument and reconsideration so as to obtain a referral to a Referee to determine appropriate attorney fees; (2) pursuant to CPLR 4301, referral to a Referee to decide on the amount of indemnification due plaintiff; (3) pursuant to CPLR 3025, leave to serve an Amended



Summons and a Second Amended Verified Complaint upon EHK TMPL and TMPL FITNESS, LLC (“TMPLLC”); and (4) modifying the caption to remove the Landlord Defendants, pursuant to the forementioned Stipulation of Discontinuance.

On September 30, 2021, TSI HK cross-moved to quash a series of third-party subpoenas issued by 99AH and to reargue and renew.

## Discussion

### I. Removing the Landlord Defendants

As an initial matter, plaintiff’s motion to modify the caption to remove the Landlord Defendants, pursuant to the April 16, 2021, Stipulation of Discontinuance with Prejudice signed by all parties, should be granted. NYSCEF Doc. No. 124.

### II. The Second Amended Complaint

Plaintiff seeks leave to serve an Amended Summons and a Second Amended Verified Complaint, NYSCEF Doc. No. 140, asserting two new causes of action: (1) seeking a determination that TSI HK is an alter-ego of the Delaware corporations EHK TMPL and TMPLLC and/or fraudulently conveyed assets to them therefore they should be jointly and severally liable for the \$250,000 judgement previously awarded in this action; and (2) attorney’s fees and other various costs associated with the terms of the APA.

“In general, leave to amend should be freely granted in the absence of prejudice or surprise, upon showing that the proposed amendment has merit.” Centrifugal Assocs., Inc. v Highland Metal Indus., Inc., 193 AD3d 385, 385 (1st Dep’t 1993). This Court finds that the proposed second amended petition is neither “palpably insufficient to state a cause of action or defense, [nor] patently devoid of merit,” and causes no prejudice or surprise to respondents. See Katz v Castlepoint Ins. Co., 121 AD3d 948, 948 (2nd Dep’t 2014) (leave to amend should be granted where the court determines that the proposed amendment is neither “palpably insufficient’ to state a cause of action or defense, [nor] patently devoid of merit” and the opponent of the motion does not allege prejudice or surprise); A.N. Frieda Diamonds, Inc. v Kaminski, 122 AD3d 517 (1st Dep’t 2014) (leave to amend should be granted where “there is no evidence that defendant would be prejudiced or surprised by the proposed amendment”).

Despite counsel for TSI HK’s claims that EHK TMPL and TMPLLC are separate entities from TSI HK, there is sufficient suggestion here that they are not, including: TSI HK’s counsel’s allowance that “TSI and the Landlord executed a new lease” despite the names on the new Lease; TSI HK’s managing member, who specializes in creating corporate entities, is also the CEO of EHK TMPL; and the name, equipment, and operation of the Gym appear unchanged despite the new corporate structure. See Shisgal v Brown, 21 AD3d 845, 848 (1st Dep’t 2005).

Therefore, 99AH’s motion to amend should be granted and, accordingly, TSI HK’s cross-motion to quash subpoenas to the newly captioned defendants should be denied.

### III. Reargument and Referee Requests

In light of the Second Amended Complaint, petitioner’s motions for reargument and reconsideration so as to obtain a referral for a Referee to determine attorney’s fees, as well as, pursuant to CPLR 4301, referral to a Referee to decide on any indemnification due plaintiff, should be denied without prejudice solely as premature.

IV. Defendant’s Reargument Cross-Motion

Finally, defendant’s cross-motion to reargue is granted, and, upon reargument, the Court adheres to its initial decision.

Here, 99AH and TSI HK entered into a contract, the APA, on November 22, 2017. As part of the APA, 99AH was to obtain a TCO and TSI HK was to recognize and perform all of the obligations of the Lease so that, pursuant to the Agreement, Landlord would release a \$250,000 TCO Security. Plaintiff 99AH performed, but defendant TSI HK breached, and Landlord kept the TCO Security, damaging 99AH.

TSI HK’s argument that the APA expired upon Closing remains unavailing based on the APA’s clear language (“the Buyer shall assume and agree to perform, pay and discharge the liabilities set forth below ... (i) all contractual obligations of either Company pursuant to the Assumed Membership Agreements, the Assumed Contracts and the Lease assumed by the Buyer, to the extent that such obligations arise or are allocable to the period from *and after the Closing date.*”) (emphasis added).

Conclusion

Thus, plaintiff 99th Avenue Holding, LLC’s multipronged motion is granted as to amending the caption and serving the Second Amended Complaint and denied without prejudice as to reargument and referee requests, and defendant TSI Hell’s Kitchen LLC’s cross-motion is granted as to reargument and denied as to the quashing of third-party subpoenas.

The Clerk is hereby directed to modify the caption of this case so as to remove defendants New York Communications Center Associates, LP, SL Green Management, Inc., LLC, and RXR Realty, LLC; and to add defendants Empire Hell’s Kitchen TMPL, LLC, and TMPL FITNESS, LLC.

12/2/2021  
DATE

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ARTHUR ENGORON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: