

1 BK St. Corp. v Les Bleecker, Inc.

2022 NY Slip Op 33218(U)

September 22, 2022

Supreme Court, New York County

Docket Number: Index No. 652418/2019

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART 37

Justice

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1 BK STREET CORP.,	INDEX NO. <u>652418/2019</u>
Plaintiff,	MOTION DATE <u>01/26/2022</u>
- v -	MOTION SEQ. NO. <u>002</u>

LES BLEECKER, INC. D/B/A NIGHTINGALE
RESTAURANT AND BAR, DE CHAO PAN, HENRY WONG,
CLAUDIA WONG, METRO CITY BANK,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff 1 BK Street Corp.'s motion to dismiss defendant's affirmative defenses, pursuant to CPLR 3211(b), and for summary judgment, pursuant to CPLR 3212, is granted.

Background

On September 6, 2017, plaintiff 1 BK Street Corp. ("Landlord"), as landlord, entered into a 15-year-lease (the "Lease") with defendant, Les Bleecker, Inc. d/b/a Nightingale Restaurant and Bar ("Tenant"), as tenant, for commercial real estate located at 89 Greenwich Avenue, New York, New York (the "Premises"). NYSCEF Doc. No. 40.

Pursuant to the Lease, Tenant took possession September 1, 2017. Id.

Article 1 of the Lease includes a schedule describing how the annual "Fixed Rent" would increase each year, from \$240,000 in 2018 to \$363,021.53 in 2031. Id.

As an inducement to sign the Lease, § 2.3 of the same provided Tenant with a seven-month rent abatement, defined as "Deferred Rental," worth \$140,000. NYSCEF Doc. No. 40. That clause, however, also provides that in the event of Tenant's default, the "Deferred Rental shall become due and payable immediately." Id.

Article 23 of the Lease, "No Surrender; No Waiver," provides that, inter alia, no act or thing done by Landlord or its agents shall be deemed an acceptance of a surrender, and no agreement to accept surrender "shall be valid unless in writing and signed by Landlord. The delivery of keys ... shall not operate as a termination of this Lease or a surrender of the Premises." Id.

On August 31, 2017, in anticipation of the Lease being signed, defendants Henry Wong (“Wong”) and De Chao Pan (“Pan,” collectively with Wong, “Guarantors”) signed a guaranty (the “Guaranty”) assuring Tenant’s performance. NYSCEF Doc. No. 41.

Section 14(H) of the Guaranty limits the Guarantors’ obligations “to the period of time commencing on the date hereof and ending three (3) months after the date Tenant sends written notice to Landlord” of its surrender of the Premises so long as: (1) all rents were paid “up to the three (3) month period after the date Tenant has surrendered possession;” (2) Landlord was given at least a three month notice of the surrender; (3) Tenant provided access to the Premises for showing of the same; and (4) Tenant forfeited its security deposit. Id.

In January 2019 Tenant ceased paying rent. NYSCEF Doc. Nos. 37 and 42.

On January 29, 2019, Tenant informed Landlord via email and certified mail that it was “closing down” and that Landlord should “consider this letter effective notification [that] LES Bleecker Inc. will be returning the keys and the surrender of the space.” NYSCEF Doc. No. 43. Tenant further promised to “complete our move out and ensure to return the space and fully vacate as soon as possible.” Id.

There is nothing on the record to imply that Landlord accepted Tenant’s surrender.

Procedural History

On April 24, 2019, Landlord sued Tenant and Guarantors, asserting five causes of action: (1) breach of lease against Tenant for rents past due; (2) breach of lease against LES for rent due for the unexpired term; (3) breach of guaranty against Pan; (4) breach of guaranty against Wong; and (5) attorneys’ fees. NYSCEF Doc. No. 1.

On July 15, 2019, Tenant and Guarantors answered with general denials and seven affirmative defenses. NYSCEF Doc. No. 5.

On August 5, 2019, Landlord amended its complaint to add two defendants, Claudia Wong and Metro City Bank (collectively, “New Defendants”), and five causes of action against Wong and the New Defendants. NYSCEF Doc. No. 7.

On October 14, 2019, Tenant and Guarantors answered the amended complaint with general denials and 11 affirmative defenses: (1) failure to state a cause of action; (2) failure to mitigate; (3) waiver and/or estoppel; (4) “unclean hands;” (5) laches; (6) accord and satisfaction; (7) intervening causes; and four defenses relating to causes of action that are now moot. NYSCEF Doc. No. 24.

In a Decision and Order dated October 22, 2019, this Court granted, on default and on the merits, a motion for alternate service upon Claudia Wong. NYSCEF Doc. No. 25.

On September 15, 2021, this Court so-ordered a stipulation of partial discontinuance as to defendants Claudia Wong and Metro City Bank, and a severance as to defendant De Chao Pan based on his Chapter 7 proceeding in United States Bankruptcy Court. NYSCEF Doc. No. 35.

On December 2, 2021, plaintiff moved, pursuant to CPLR 3211(b), to dismiss defendants' remaining affirmative defenses and, pursuant to CPLR 3212, for summary judgment on the remaining first, second, fourth, and fifth causes of action in the Amended Complaint. NYSCEF Doc. No. 36.

On December 15, 2021, the remaining parties stipulated to adjourn the return date for the instant motion from December 22, 2021, to January 26, 2022. NYSCEF Doc. No. 51.

On February 3, 2022, Wong filed a Suggestion of Bankruptcy after a Chapter 7 bankruptcy petition was filed on his behalf in the United States Bankruptcy Court, Eastern District of New York, case number 1:22-40193, on February 2, 2022. NYSCEF Doc. No. 52.

The Suggestion of Bankruptcy automatically stayed the instant matter.

On March 30, 2022, plaintiff wrote a letter to this Court informing it that on March 25, 2022, pursuant to a Notice of Automatic Dismissal, Wong's bankruptcy case had been dismissed under § 521(o)(1) of the Bankruptcy Code due to outstanding filing deficiencies. NYSCEF Doc. No. 53.

On or about September 9, 2022, the stay of the instant matter was lifted.

Since filing the Suggestion of Bankruptcy, neither Wong nor Tenant have appeared before the Court, and their time to respond to the instant motion has expired.

Discussion

A "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." CPLR 3211(b). In "deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 542 (1st Dep't 2011).

Here, defendant has failed to oppose the instant motion and, a fortiori, has failed to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action. Therefore, Landlord's motion to dismiss defendants' remaining affirmative defenses should be granted.

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden shifts to the

party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

The elements of a cause of action for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep’t 2010).

It is undisputed that Tenant entered into the Lease for (and took possession of) the Premises. NYSCEF Doc. Nos. 40, 44 ¶ 10, and 45 ¶ 10.

Landlord has made a prima facie showing of breach of lease and guaranty by providing, inter alia: a copy of the pleadings (NYSCEF Doc. No. 44); the Lease (NYSCEF Doc. No. 40); an affidavit of Isabel Negron, Managing Agent for Landlord, with personal knowledge of plaintiff’s record keeping (NYSCEF Doc. No. 37); the rent ledger for the Premises showing no payments after December 18, 2018 (NYSCEF Doc. No. 42); an email in which Tenant purports to surrender the Premises well before the end of the Lease (NYSCEF Doc. No. 43); and the Guaranty (NYSCEF Doc. No. 41). CPLR 3212(b).

This Court should therefore grant that part of Landlord’s first cause of action for breach of contract seeking \$83,000 in rent owed (\$140,000 in forfeited Deferred Rent + \$23,000 in January 2019 rent - \$80,000 in security deposit) but deny that portion seeking \$5,763.45 in proportionate real estate taxes, as Landlord has failed to support that figure with documentary evidence.

Further, because Tenant’s purported surrender of the Premises was not accepted, and because Landlord had no duty to mitigate, contractual or otherwise, this Court should grant Landlord’s second cause of action for breach of contract seeking \$4,120,739.48 (see NYSCEF Doc. No. 44 ¶14, setting forth, pursuant to the Lease, rents owed from February 2019 through August 2032).

Finally, this Court should grant Landlord’s fourth cause of action for breach of guaranty against Wong in the amount of \$4,203,739.48 ((\$140,000 in forfeited Deferred Rent + \$23,000 in January 2019 rent - \$80,000 in security deposit + \$4,120,739.48 in future rents), as Tenant breached the Lease but failed to satisfy the conditions set in Section 14(H) of the Guaranty that might limit Wong’s obligations.

Conclusion

Plaintiff 1 BK Street Corp.’s motion is granted. The Clerk is hereby directed to enter judgment: (1) against defendant LES Bleecker, Inc., d/b/a Nightingale Restaurant and Bar, on the first cause of action in the amount of \$83,000 plus statutory interest from January 2019; (2) against defendant LES Bleecker, Inc., d/b/a Nightingale Restaurant and Bar, on the second cause of action in the amount of \$4,120,739.48; and (3) against defendant Henry Wong, on the fourth cause of action in the amount of \$4,203,739.48.

It is further ordered that plaintiff’s fifth cause of action seeking attorney’s fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Plaintiff must

file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 15 days of filing the Note of Issue, to contact chambers to schedule the inquest date.



9/22/2022
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE