

**Kensington House NY LLC v Accardi**

2023 NY Slip Op 31673(U)

May 17, 2023

Supreme Court, New York County

Docket Number: Index No. 651365/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14

*Justice*

-----X

KENSINGTON HOUSE NY LLC

Plaintiff,

- v -

NICHOLAS EMIL ACCARDI,

Defendant.

-----X

INDEX NO. 651365/2022

MOTION DATE 05/12/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment and to dismiss defendant's affirmative defenses and counterclaim is granted as described below.

**Background**

In this commercial lease case, plaintiff seeks to recover based upon a guaranty signed by defendant. It alleges that defendant—the guarantor—is barred from asserting any affirmative defenses or a counterclaim based upon the unconditional and absolute guaranty. Plaintiff also seeks to amend the complaint to conform to the proof. Specifically, plaintiff points out that NYC Administrative Code § 22-1005 (which prohibited landlords from collecting based upon guaranties in certain, specific instances) was recently held unconstitutional and so plaintiff moves to amend to include amounts it previously omitted based upon this section.

In opposition, defendant claims that the personal guaranty is unenforceable and that he has demonstrated that the doctrine of impossibility applies to the lease and the guaranty. Defendant explains that he ran a pizza place in the subject location for 28 years and that COVID-

19 decimated his ability to pay the rent. He points out that his sales fell by more than \$2,000 per day and he put his own money into the business to keep it afloat. Eventually, he decided to walk away from the store and return the keys after spending nine months losing money.

### **Discussion**

As an initial matter, the Court observes that the opposition does not sufficiently address the arguments raised by plaintiff regarding the affirmative defenses or the counterclaim. Defendant raised an affirmative defense and a counterclaim based upon an Administrative Code provision relating to personal guarantees for commercial leases, as well as two affirmative defenses based on plaintiff's failure to name the tenant as party plus an affirmative defense of accord and satisfaction. None of these arguments compel the Court to deny plaintiff's motion for summary judgment nor did defendant raise a material issue of fact in opposition.

With respect to the first affirmative defense and the counterclaim based upon NYC Administrative Code § 22-1005, the Court observes that a federal judge has found this section to be unconstitutional (*Melendez v City of New York*, 20-CV-5301 (RA), 2023 WL 2746183, at \*16 [SD NY 2023]). The provision at issue prohibited landlords from seeking to collect on individual guarantees related to commercial leases during a specified period (due to the COVID-19 pandemic). Plaintiff admits it did not include certain amounts in its complaint because of this provision. The federal court concluded that this law “violates the Contracts Clause by rendering the guaranty clauses in Plaintiffs’ commercial leases unenforceable for unpaid rent during the covered period, March 7, 2020 and June 30, 2021” (*id.*).

Plaintiff urges this Court to adopt the federal court’s reasoning and permit plaintiff to amend its complaint to seek unpaid rent it deliberately did not request in the pleading because of this law. Although plaintiff specifically cited (and discussed) this federal court case in its

moving papers, defendant failed to address this case at all in his opposition. Defendant did not, for instance, explain why this Court should depart from the reasoning in *Melendez* or suggest ways in which the instant matter might differ from that case and render its holding inapplicable to the instant circumstances. Therefore, the Court adopts the reasoning in *Melendez* and permits plaintiff to amend to seek unpaid rent (pursuant to the guaranty) for the period previously covered by Section 22-1005.

To the extent that defendant claims the tenant is a necessary party, that claim is without merit as the guaranty specifically permits plaintiff to bring a case solely against defendant (*see* NYSCEF Doc. No. 16, ¶ [3][A]). In other words, plaintiff did not need to bring a case against the tenant at all given that the guaranty imposed an unconditional obligation on defendant to pay any unpaid rent owed by the tenant.

The affirmative defense of accord and satisfaction is also dismissed as plaintiff observes that the reduced rent was reflected on the rent statement and, in any event, defendant never met the conditions of the good guy clause to avoid his obligation to pay any unpaid rent owed by the tenant.

The Court rejects defendant's apparent reliance on an impossibility defense which, as plaintiff points out in reply, defendant did not raise in its answer. In any event, the Appellate Division, First Department has consistently found that impossibility is not a cognizable defense to a failure to pay rent claim based upon the COVID-19 pandemic (*see Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577, 151 NYS3d 37 [1st Dept 2021]).

The Court grants the request for legal fees, but directs that plaintiff make a motion for such relief, including attaching relevant proof. That way, the Court can evaluate whether a hearing is required.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted, defendant's affirmative defenses and counterclaim are severed and dismissed, plaintiff's branch of the motion to amend pursuant to CPLR 3025(c) to conform to the evidence is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$397,272.55 plus statutory interest from January 15, 2022 (a reasonable midpoint); and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff shall make a separate motion for such relief on or before June 14, 2023.

5/17/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE