

**Pearlbud Realty Corp. v Guide N.Y. City Inc.**

2023 NY Slip Op 33198(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 650586/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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PEARLBUD REALTY CORPORATION,

Plaintiff

Index No. 650586/2022

- against -

DECISION AND ORDER

GUIDE NEW YORK CITY INC. and MERGEN  
SARYYEV,

Defendants

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LUCY BILLINGS, J.S.C.:

This action is the third in a series between plaintiff, the owner of 452 West 45th Street, New York County, and defendant commercial tenant Guide New York City Inc. In the first action, Guide New York City claimed its landlord Pearlbud Realty Corporation tortiously interfered with Guide New York City's prospective business by leasing premises to its competitor near the premises that Guide New York leased from Pearlbud Realty, at a discounted rent more favorable to the competitor than the rent charged to Guide New York City. It stipulated to discontinue that first action with prejudice. It commenced a second action against Pearlbud Realty based on the same factual allegations, but adding legal theories including prima facie tort. In this third action, where Pearlbud Realty sues Guide New York City for arrears in rent, additional rent, real estate taxes, and late fees, Guide New York City counterclaims again based on the same

factual allegations, adding yet another legal theory of constructive eviction, and further claiming that Pearlbud Realty prevented Guide New York City from surrendering the leased premises.

I. PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS AND FOR SANCTIONS AND DEFENDANTS' PROCEDURAL MOTIONS IN RESPONSE

Plaintiff Pearlbud Realty has moved to dismiss the counterclaims by defendant Guide New York City and its sole shareholder and guarantor of its obligations under the lease, defendant Saryyev, and for sanctions, based on the res judicata effect of Guide New York City's stipulation of discontinuance in its first action. C.P.L.R. § 3211(a)(1) and (5); 22 N.Y.C.R.R. § 130-1.1. Plaintiff has withdrawn its motion for sanctions based on C.P.L.R. § 8303-a. Defendants have withdrawn their cross-motion to stay this action.

The court's order dismissing Guide New York City's claims against Pearlbud Realty in the second action determines Pearlbud Realty's motion to dismiss Guide New York City's counterclaims here based on res judicata, even if Guide New York City has labelled the same transactions and occurrences with different legal theories. In re Hunter, 4 N.Y.3d 260, 269 (2005); Tantaros v. Krechmer, 180 A.D.3d 481, 481 (1st Dep't 2020); Navigators Ins. Co. v. Ironshore Indem., Inc., 156 A.D.3d 426, 427 (1st Dep't 2017); Magen David of Union Sq. v. 3 W. 16th St., LLC, 132 A.D.3d 503, 504 (1st Dep't 2015). The sole exception is Guide

New York City's additional counterclaim that Pearlbud Realty prevented Guide New York City from surrendering the leased premises, discussed below.

Defendant Saryyev in this action was not a party in the first action that Guide New York City discontinued with prejudice. Nevertheless, not only was he in privity with Guide New York City such that the prior stipulation of discontinuance may bind him as well, People v. Applied Card Sys. Inc., 11 N.Y.3d 105, 122 (2008), but in any event none of the counterclaims in this action alleges any injury to him as the guarantor of the tenant's lease obligations, distinct from injury to the tenant corporation.

In this action, Guide New York City simply sought to preserve through its counterclaims the claims it had instituted in the second action before they were dismissed. While sanctions may have been warranted in the second action, since the court did not impose them there, they are not any more warranted here. 22 N.Y.C.R.R. § 130-1.1(c). Finally, the dismissal of the second action renders moot Guide New York City's motion to consolidate this action with the second action.

Guide New York City's additional counterclaim and partial defense to Pearlbud Realty's claims is nearly incomprehensible: that somehow, but Guide New York City fails to explain how, Pearlbud Realty prevented Guide New York City from vacating its

leased premises sooner, which would have reduced its liability for rent, additional rent, real estate taxes, and late fees. The parties' lease set forth a procedure for the tenant to surrender the premises. Guide New York City never followed that procedure, but continued to occupy the premises during the period for which Pearlbud Realty seeks rent, and never surrendered the keys to the premises to Pearlbud Realty's superintendent until the end of that period. See Riverside Research Inst. v. KMG, Inc., 68 N.Y.2d 689, 691 (1986); Bay Plaza Estates, Inc. v. New York Univ., 257 A.D.2d 472, 473 (1st Dep't 1999). Guide New York City fails to explain how competition from another tenant of Pearlbud Realty impeded Guide New York City's compliance with the lease's provisions for surrender.

## II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Guide New York City insists that Pearlbud Realty's second motion, for summary judgment, is premature because Pearlbud Realty has never replied to Guide New York City's counterclaims. While summary judgment dismissing the counterclaims would be premature, since Guide New York City has answered the complaint, summary judgment on plaintiff's claims is not premature. City of Rochester v. Chiarella, 65 N.Y.2d 92, 101 (1985).

Pearlbud Realty seeks summary judgment for rent, additional rent, real estate taxes, and late fees for January 2020 through July 2022, which Pearlbud Realty's business records of rent due

and unpaid, for which its property manager lays a business record foundation, support. C.P.L.R. § 4518(a). New York City Administrative Code § 22-1005(1)(b) would bar recovery of rent, additional rent, real estate taxes, and late fees against the guarantor Saryyev for April 2020 through June 2021 if Guide New York City used the leased premises for a "non-essential retail establishment" on which the New York Governor's Executive Orders imposed occupancy limitations during the COVID-19 pandemic. The lease provides that Guide New York City was to use the premises for the storage of pedicabs. Guide New York City maintains that it used the premises for the storage of pedicabs, bicycles, and scooters that the public picked up at the premises, rented, and returned to the premises. Whether the 15 months from April 2020 through June 2021 are to be subtracted from the period for which Saryyev is liable for rent and real estate taxes because the premises were a retail establishment is an issue for trial. Guide New York City supports no other defense to Pearlbud Realty's claim for rent, additional rent, real estate taxes, and late fees.

Pearlbud Realty also establishes its entitlement under the lease to attorneys' fees and expenses for prosecuting this action. Pearlbud Realty moves for summary judgment only on the liability of Guide New York and Saryyev for plaintiff's attorneys' fees and expenses. Therefore the reasonable amount of

fees and expenses Pearlbud Realty has incurred in this action is also an issue for trial.

### III. CONCLUSION

In sum, for the reasons explained above, the court grants plaintiff Pearlbud Realty Corporation's motion to dismiss the counterclaims by defendants Guide New York City Inc. and Saryyev, but denies its motion for sanctions. C.P.L.R. § 3211(a)(1) and (5); 22 N.Y.C.R.R. § 130-1.1(c). Defendants have withdrawn their cross-motion for a stay. The court denies their separate motion for consolidation as moot. The court grants plaintiff's motion for summary judgment for rent, additional rent, real estate taxes, and late fees against Guide New York City for 31 months, January 2020 through July 2022, totalling \$406,707.62, and against Saryyev for 16 months, January through March 2020 and July 2021 through July 2022. C.P.L.R. § 3212(b) and (e). The court also grants plaintiff's motion for summary judgment on both defendants' liability for reasonable attorneys' fees and expenses incurred in this action. Id. The issues of (1) Saryyev's liability for rent and real estate taxes for 15 months, April 2020 through June 2021, (2) the amount attributable to the other 16 months if he is not liable for the full 31 months, and (3) the amount of reasonable attorneys' fees and expenses to which plaintiff is entitled remain for trial.

DATED: September 8, 2023

  
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LUCY BILLINGS, J.S.C.