

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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LENOX NY LLC,

Plaintiff,

- against -

JAMES GOLDMAN,

Defendant.
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Index No. 655585/2017

**AFFIDAVIT OF
JAMES GOLDMAN
IN SUPPORT OF
DEFENDANT'S CROSS
MOTION TO DISMISS**

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

JAMES GOLDMAN, being duly sworn, deposes and says:

1. I am the defendant herein and I have personal knowledge of the following facts.
2. This affidavit is submitted in support of my cross motion to dismiss for the failure of plaintiff Lenox NY LLC ("Plaintiff," or "Landlord") to serve process, or, in the alternative, to stay this action pending an auction for the sale of the restaurant business at issue scheduled for November 28, 2017 by the United State Bankruptcy Court for the Southern District of New York, and the sale resulting from said auction, the proceeds of which will be used to pay off alleged lease arrears claimed in this action. I also submit this affidavit in opposition to Plaintiff's motion for summary judgment in lieu of complaint.

Plaintiff Failed to Serve Process

3. Plaintiff commenced this action on August 29, 2017 by filing a Summons and Notice of Motion for Summary Judgment in Lieu of Complaint that was returnable in this court on October 31, 2017. Copies of the Summons and Notice of Motion are annexed hereto as Exhibit A.

4. On October 5, 2017, Plaintiff filed an Affidavit of Service, a copy of which is annexed hereto as Exhibit B.

5. The Affidavit of Service claims that the Summons and Notice of Motion were served on “Bill ‘Doe’ (friend/refused last name)” at the address 101 Drake Road, Pleasant Valley, NY 12569 (“101 Drake”).

6. I maintain a vacation home at 101 Drake. However, neither I, nor any member of my family, nor any of my friends, were present at 101 Drake on August 29, 2017. In short, no one was home.

7. I do not know who “Bill Doe” refers to, but it is certainly not me, a member of my family, nor any of my friends, nor anyone employed by me.

8. I was never served with papers in this action. I was never contacted by a person named “Bill” about this action.

9. I only found out about this action when I received a solicitation letter from a lawyer located in upstate New York whom I have never met. The letter stated that a lawsuit had been filed against me and asked if I needed representation. Thereafter, I immediately contacted my bankruptcy lawyer, Robert Rattet PLLC, for my companies, 175 Tenant and 171 Tenant (see paragraph 15, below), who saw that the case had been filed electronically. Robert Rattet PLLC never appeared for me in this action at any time.

10. In addition, a couple weeks ago I received an email from the attorney for Plaintiff, Bradley S. Gross, regarding an Amended Notice of Motion. I did not receive the email immediately as it was received in my “junk” folder.

11. I was never served with the Amended Notice of Motion or related papers. A couple of weeks ago, I learned from a gardener I employ at my vacation home that a federal

express package had been left there but was never signed for by any person. My gardener said that the package had simply been left on the ground around the premises.

12. This is clearly defective service. Therefore, this case should be dismissed for Plaintiff's failure to serve process.

Even If Service of Process Was Good, The Notice of Motion Was Not timely Served

13. The Affidavit of Service of the Summons and Notice Motion alleges that papers were delivered to someone who was not me at my vacation home.

14. I am aware that because the Affidavit of Service was filed on October 5, 2017, I was entitled to a total of forty (40) days from October 5th to answer the papers. However, the initial Notice of Motion set a return date of October 31, 2017. Thus, I was not given the requisite forty days to respond, and the initial Notice of Motion was defective.

The Amended Notice of Motion Was Improperly Served

15. Sometime after the initial Summons and Notice of Motion was delivered, as indicated above, Plaintiff's attorney allegedly sent my company's bankruptcy counsel, Robert Rattet PLLC, a copy of an Amended Notice of Motion for Summary Judgment returnable on November 30, 2017, which I am informed added additional claims. I was never served with this Amended Motion as required by law.

16. Accordingly, since the Amended Notice of Motion was never properly served as required by law, the motion as allegedly amended must be dismissed.

**In the Alternative, This Case Should Be Stayed
Pending the Upcoming Bankruptcy Auction and Sale**

A. The Leases

17. I am the Managing Member of 175 Lenox Restaurant, LLC d/b/a Little Bamboo (“175 Tenant”) and 171 Lenox Restaurant LLC (“171 Tenant,” and together with the 175 Tenant, the “Tenants”).

18. On August 7, 2014, Plaintiff, as landlord, and the 175 Tenant, as tenant, entered into a written lease (“175 Lease”) for a portion of the ground floor and basement in the building known as 175 Lenox Avenue, New York, New York (“175 Premises”). A copy of the 175 Lease is annexed as Exhibit D to Plaintiff’s initial motion papers (NYSCEF Doc. No. 8).

19. On April 30, 2015, Plaintiff, as landlord, and the 171 Tenant, as tenant, entered into a written lease (“171 Lease”) for a portion of the ground floor in the building known as 171 Lenox Avenue, New York, New York (“171 Premises”). A copy of the 171 Lease is annexed as Exhibit A to Plaintiff’s initial motion papers (NYSCEF Doc. No. 5).

20. The 175 Premises and 171 Premises are contiguous spaces (hereinafter together referred to as the “Leased Premises”). It was originally understood by Plaintiff and the Tenants that the Leased Premises would be combined into a single space and function as a single restaurant.

21. In fact, with the Plaintiff’s consent part of the wall between the two spaces was removed and the two spaces were combined.

22. The parties also contemplated that the Tenants would perform renovations to the space and that Plaintiff would cooperate with the Tenants by granting appropriate easements and access. Paragraph 44(a) of the 175 Lease states in pertinent part as follows:

Tenant shall not make any structural alterations to the Demised Premises or any part thereof without the written consent of Landlord which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, the Landlord consents

that the Tenant may construct at his sole cost and expense to convert the premises to a **RESTAURANT/CAFÉ with the service of alcoholic beverages**, and to make any required amendment to the existing plans for the premises. In addition, the Tenant shall, at its sole cost and expenses, obtain any and all necessary permits and obtain any and all required certificates from any governmental authority or agency so that the **Tenant** is a legal renovated operating facility. Owner shall cooperate with Tenant in the filing of for permits and or licenses in a timely manner and shall execute any such documents as are reasonably required to be completed by the Owner to process said applications(s)...

...In connection with any Alterations hereunder, including Tenant's Initial Alterations, Owner agrees to provide Tenant access (by way of easement, license or otherwise) throughout the Building for purposes of Tenant's Alterations, including but not limited to installation of all piping and other conduits required by Tenant in order to perform Tenant's Alterations, all as more particularly set forth in Tenant's Plans and Specifications relative to Tenant's Initial Alterations

23. Pursuant to paragraph 44(a)(iv), Plaintiff specifically granted to 175 Tenant:

easement and access to Building's roof, back yard (if available and feasible) and/or necessary easements (as required) through other tenant's premises for purposes of installing condensing units and/or blowers for Tenant's HVAC system and ventilation system, and running exhaust ducts extending to the roof of the Building, if required.

24. Similarly, the "Permitted Use" set forth in the 171 Lease confirms that the space would be used as "retail and restaurant food and beverage service with the sale of Alcoholic Beverages to the public."

25. Like the 175 Lease, the 171 Lease requires Plaintiff to cooperate with the tenant in executing documents reasonably required for renovations necessary for the operation of the restaurant. Article 5.1 of the 171 Lease states as follows:

Landlord shall cooperate with Tenant in the filing for permits and or licenses in a timely manner and shall execute any such documents as are reasonably required to be completed by the Landlord to process said applications...

26. Both Leases require Plaintiff as landlord to maintain the building and perform structural repairs. Both Leases also grant the Tenants the right to quiet enjoyment of the Leased Premises so long as they are not in default.

B. Plaintiff's Breaches of the Leases

27. Plaintiff breached both Leases by refusing to sign approvals to install an exhaust vent necessary for cooking food, which is obviously necessary for operating a restaurant.

28. We were cooking and preparing sushi and Japanese cuisine in the Leased Premises and we needed an exhaust vent so that the odors would be directed out of our building.

29. Unfortunately, the building is a condominium and the residents and counsel for the condominium continually complained about the odors of food and noise from the restaurant.

30. Despite our submission of plans to Plaintiff, the building condominium refused to approve these plans and Plaintiff did nothing to help us get these plans approved.

31. Plaintiff also refused to assist the Tenants in obtaining permission from the condominium tenants to install an exhaust vent, which is required by the Leases and necessary for the operation of any restaurant. Annexed hereto as Exhibit C is an email from me to the Plaintiff's managing agent dated February 1, 2017 following up on one of my many requests for Plaintiff's approval, which was unreasonably withheld:

Just following up on our need to vent and exhaust the odors that the building and more specifically, the owner living above us, has complained about. Have you gotten permission?

32. We also discovered that there were holes and significant penetrations above our ceiling in the structure between the ground and first floor that were not sealed properly when the building was constructed.

33. Because of these holes in the ceiling, the Tenants also suffered from water leaks from the residential apartment above us, which severely damaged the Tenants' property and destroyed our ability to operate a restaurant.

34. The structural defects in the ceiling of the Leased Premises persisted ever since the first Lease was signed, and Plaintiff never addressed these defects despite Tenants' constant complaints.

35. For instance, annexed hereto as Exhibit D is an email from me to Plaintiff's managing agent dated June 16, 2015 regarding the "still persistent and ongoing problem with ceiling leaks." Attached to the email are photos showing extensive water infiltration.

36. Annexed hereto as Exhibit E is an email from me to Plaintiff's managing agent dated September 26, 2016 in which I state as follows:

Elizabeth, I trust you are well. I have heard nothing from you on the ceiling issues within 171 and 175 Lenox. We chatted at length about the failure to the building to insulate the ceiling above our drop ceiling and the failure of the building to have all holes and penetrations properly sealed.

We continue to spend substantial amounts of money enhancing Little Bamboo yet it appears no progress is being made on these pressing matters. We are unable to conduct ourselves as a true full service restaurant absent you and or the building dealing with the ceiling issues. We have long had plans to develop a Ramen component for the cold season as sushi isn't exactly the go to food when its 30 degrees outside. It is illogical to expense more money on 171 Lenox if due to construction flaws we are unable to conduct our business...

We are unable to operate Little Bamboo as it was conceived due to these ceiling matters being unattended to.

37. As a result of Plaintiff's repeated breaches of the Leases, the Tenants were unable to operate the restaurant as we planned. This caused us significant financial hardship as we could not cook. We tried to work out a solution with Plaintiff while they tried to work out their

problems with the condominium, but a resolution became impossible when we informed them that we could no longer pay rent because we could not operate the restaurant as contemplated by the Lease.

38. Thus, on February 21, 2017, Plaintiff served a purported Rent Demand alleging defaults in the payment of rent and additional rent. The Tenants sharply dispute the amounts and offsets alleged by Plaintiff based on Plaintiff's egregious breaches of the Leases, and payment made for each of the spaces.

C. The Bankruptcies

39. On May 15, 2017, the 175 and the 171 Tenant separately filed for Chapter 11 bankruptcy in order to preserve the value of their interest in the Leased Premises. Each Lease has a remaining term of 12 years, which is a valuable asset of the Tenants. Annexed hereto as Exhibit F is a copy of the Voluntary Petition filed by the 175 Tenant. Annexed hereto as Exhibit G is a copy of the Voluntary Petition filed by the 171 Tenant.

40. Plaintiff has appeared in both bankruptcy actions and has filed a Proof of Claim in the 175 Tenant action.

41. Therefore, Plaintiff's claims for rent and additional rent in the case at bar are presently being litigated as part of the bankruptcy proceedings.

42. Shortly after filing for bankruptcy, the Tenants commenced efforts to sell the restaurant business so as to pay off creditors, including Plaintiff.

43. On November 6, 2017, the 175 Tenant filed a motion for an order establishing bidding procedures to govern the sale of the restaurant business and approving the sale of the business, among other relief. A copy of the motion papers are annexed hereto as Exhibit H.

44. The motion confirmed that the 175 Tenant had already obtained two purchase offers. Attached to the motion papers are a draft asset purchase agreement from one potential purchaser and a written offer from another potential purchaser.

45. The motion also specifically acknowledges that part of the proceeds from the sale will be used to pay off alleged arrears and will be escrowed for that purpose. See motion, ¶ 60.

46. On November 16, 2017, the Bankruptcy Court issued an Order approving bidding procedures for the sale and scheduling an auction and sale hearing. A copy of the Order is annexed hereto as Exhibit I.

47. The Court Ordered that the 175 Tenant, as debtor, “will conduct the Auction commencing at 2:00 p.m. on November 28, 2017 at the United States Bankruptcy Court, One Bowling Green, New York, NY 10004.” Order, p. 2. The Court also ordered as follows:

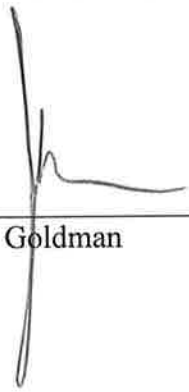
ORDERED, that immediately following the conclusion of the Auction a hearing shall be held before the Honorable Michael E. Wiles, United States Bankruptcy Judge, at the United States Bankruptcy Court, Southern District of New York, One Bowling Green, Courtroom 617, New York New York 10004 (the “Sale Hearing”) to confirm the results of the Auction sale and authorize the sale of substantially all of the Debtor’s Assets and/or LLC Membership Interests, based upon the results of the Auction, to the highest and/or best bidder and grant such other related relief as may be deemed necessary or proper by the Court...

48. Plaintiff is well aware of the pending auction and sale because Plaintiff has appeared in the bankruptcy proceedings and receives electronic notices.

49. The sale of the restaurant will allow for distributions to Plaintiff for alleged lease arrears, subject to the adjudication of the Tenant’s claims arising from the Plaintiff’s inaction and breach of the Lease. This will resolve Plaintiff’s claims in this action.

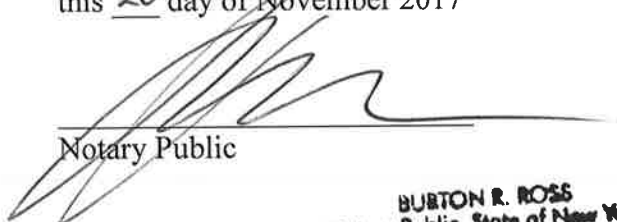
50. Accordingly, if this action is not dismissed this action, it should be stayed in the interests of justice pending the auction and resulting sale of the restaurant business.

WHEREFORE, it is respectfully requested that this Court enter an order denying Plaintiff's motion, granting defendant's cross motion, and dismissing or staying the present action.



James Goldman

Sworn to before me
this 20 day of November 2017



Notary Public

BURTON R. ROSS
Notary Public, State of New York
No. 01RO4527479
Qualified in Nassau County
Commission Expires Dec. 31, 2018