

IN THE COUNTY COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

5501 NE 2ND AVENUE, LLC,
a Florida limited liability company,

CIVIL DIVISION

Plaintiff,

CASE NO.:2020-018438-CC-05

vs.

DISTRICT LIVE AGENCY, LLC,
d/b/a CHURCHILL'S PUB,
a Florida limited liability company,
and all others in possession,

Defendant.

--and--

DISTRICT LIVE AGENCY, LLC,
a Florida limited liability company; and
THE BEVERAGE GROUP, LLC
a Florida limited liability company

Counter-Plaintiffs,

vs.

5501 NE 2ND AVENUE, LLC,
A Florida limited liability company;
LITTLE HAITI DEVELOPMENT PARTNERS, LP,
A Florida limited partnership;

Counter-Defendants.

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION TO DETERMINE RENT

BEFORE ME, the undersigned authority, personally appeared, Franklin Dale, who, upon being duly sworn, deposes and states:

1. My name is Franklin Dale and I am the principal owner of Defendant/Counter-Plaintiff District Live Agency, LLC ("DLA") and Counter-Plaintiff The Beverage Group, LLC ("TBG").

2. I am over eighteen years of age and am authorized to attest to the matters set forth herein.

3. I have personal knowledge of the matters set forth herein.

4. This affidavit (“Affidavit”) is made in support of the following pleadings filed by DLA in the above-referenced action: 1) the Motion to Determine Rent or in the Alternative Motion to Dismiss; 2) Answer and Affirmative Defenses; and 3) Counterclaim.

5. Over the course of six (6) years, DLA and the TBG are owed hundreds of thousands of dollars from Counter-Defendant Mallory Kauderer (“Kauderer”) and/or Plaintiff/Counter-Defendant 5501 NE 2nd Ave LLC (“5501 LLC” or “Landlord”), and/or Counter-Defendant Little Haiti Development Partners, LP (“LHDP”).

6. The eviction proceedings at issue in this action are unlawful, as the facts do not support that there has been non-payment of rent, and being prosecuted as a part of an unlawful scheme, contrary to established agreements and in direct retaliation for my speaking out against the unlawful conduct of Kauderer in regards to the misappropriation of CARES Act funds, as generally described herein.

7. In spite of my group’s best efforts to resolve this matter amicably and according to long-held agreements made in good faith over several years, I’ve only been met with repugnant accusations and restraint of trade/self-help tactics that prohibit my rightful operation of the Business and leading to this legal action.

8. As reflected in this Affidavit, the stated claim for non-payment of rent as contained on the Three Day Notice served pursuant to the underlying action and the eviction complaint, is grossly inaccurate and in fact, there is no rent due or owing under these circumstances.

9. On or about November of 2018, while I was an independent contractor overseeing the management team at the Business (as I had been for the four years prior), I was made aware of the serious financial issues that the Business was suffering, including revenue garnishment by the merchant services (credit card processing), sending the business in a crisis. This was the direct result of Kauderer's hard money cash advances against the Business' revenues. He created an unsustainable burden by never making any capital contributions to compensate for his large daily withdrawals, resulting in legal claims and harassment as recent as November 2019 (after signing of the Lease).

10. An example of such is seen in the attached Exhibit "1" to this Affidavit reflecting "Churchill's Pub LLC Delinquent Loan".

11. At this time, I made demand of Kauderer for monies owed to me and communicated that due to the Business's heavy financial impediments, I was no longer interested in continuing my role with the Business.

12. With the Business operating accounts at this time being garnished, Kauderer's immediate response to me was an offer to take over the Business. After creating Churchill Beverage LLC (a partnership between TKLS LLC and TBG), owned 50/50 by myself and Leavitt until a sole ownership transfer could be memorialized. It was agreed that Churchill Beverage LLC was from there, the owner of a 100% interest in the Business of which my company, TBG, owned 50%.

13. In March of 2019, Plaintiff was unable to make its mortgage payment on the Property to its lender.

14. In about mid-March of 2019, I reached an agreement ("Agreement") as to the transition of sole ownership of Churchill's Pub (the "Business") with Mallory Kauderer

(“Kauderer”) and Donita Leavitt (“Leavitt”), principals of Plaintiff 5501 NE 2nd Ave LLC. This was a required prerequisite to DLA entering into the subject lease dated April 1, 2019 (“Lease”).

15. The express terms and understandings (“Terms and Understandings”) of the Agreement were the prevailing relied upon consideration for DLA to enter the Lease and included that: 1) the monthly rent for the property located at 5501 NE 2nd Ave., Miami, FL 33137 (the “Property”) would be eight thousand dollars [\$8,000]; 2) an additional eight hundred dollars [\$800] per month would be credited as a pre-payment for annual taxes and insurance; 3) in the event of any rent shortage, any monies owed to DLA or TBG by Plaintiff or Kauderer would be applicable to and when needed, applied to any rent balances under the Lease; and 4) the signing of the Lease by DLA, plus a payment made in the amount of eight thousand (\$8,000.00), via check dated March 18, 2019 (from TBG) notated to reflect a fee (the “Business Transition Fee”) for the “transfer of the business” [of Churchill’s Pub], resulted in a transfer of ownership of the business to TBG. See “Exhibits 2.1-2.3” reflecting transfers.

16. Plaintiff and/or Kauderer used the Business Transition Fee to make the March, 2019 mortgage payment Kauderer had previously been unable to make.

17. I would not have entered into the Lease or paid the Business Transition Fee but for the Agreement and its Terms and Understandings.

18. My reliance upon the Terms and Understandings of the Agreement was evident prior to signing the Lease because I formed DLA just days later, on March 22, 2019, in specific reliance of the Terms and Understandings of the Agreement which terms I relied upon for purposes of obtaining capital partnership in DLA. My new partners and I relied upon the Terms and Understandings of the Agreement, including that DLA’s entering into the Lease beginning in

April, 2019 was expressly predicated upon DLA's unencumbered ownership of the Business commencing upon the signing of the Lease.

19. Kauderer knew and understood that DLA was formed, bringing my new partners into the Business, in express reliance upon the Agreement and its Terms and Understandings.

20. Prior to the Agreement to transfer the Business, the Business was owned by Churchill Beverage LLC. Kauderer was never an owner of Churchill Beverage LLC and thus any representation by Kauderer holding himself out as an owner, as he is currently representing to/with his new Opportunity Zone partners (see: www.dlhoz.com/mallory-kauderer), of the Business is false.

21. During the subject period, with respect to the Business, Kauderer's connection was only that of a landlord and payments owed under the Lease were to be made and applied consistent with the Agreement and its Terms and Understandings.

22. I have at all times acted in reasonable reliance on the Terms and Understandings of the Agreement.

23. Kauderer's course of conduct and express representations during the subject period ratified the Terms and Understandings of the Agreement.

24. Kauderer's assent to the Term/Understanding concerning ownership of the Business is reflected in the copy of the text message exchange between him and I, attached here as "Exhibit 3". This text message exchange makes clear that (in Kauderer's words) "[t]he new Lease mean[t] [I] own the business [FD]!...[as of] April 1 [and that's not playing April fools...]."

25. As seen in the text message exchange attached as Exhibit "3" I was clear that I had to own the business outright to have my new partners come in so that we could functionally save

the business, which as stated above, was being devastated by financial impediments caused by Kauderer.

26. From April 1, 2019 to January of 2020, pursuant to my ownership of the Business, I contributed additional capital for prepayments of tax and insurance costs totaling \$18,900 (the “2019 Taxes and Insurance Payments”) to cover monies owed under the triple net portion of the Lease, which included tax and insurance payments, for 2019.

27. Pursuant to the 2019 Taxes and Insurance Payments, following the calendar year of 2019, Kauderer nor Plaintiff ever provided any invoice and made demand for any tax or insurance related payments because such payments were paid pursuant to the 2019 Taxes and Insurance Payments.

28. On January 10, 2020, Leavitt sent me an email attaching DLA’s “Statement and Open Balance Report” for the year 2019.

29. The Statement and Open Balance Report reflected that only \$1,380.00 (the cost of one-month rental of the liquor license) was due from the year 2019.

30. The Statement and Open Balance Report however, contains a line item for a security deposit in the amount of \$10,200.00 which was paid in May of 2019. Attached hereto as “Exhibit 4.1-4.2” are banking statements confirming the overpayment of the security deposit amount of \$10,500.00.

31. Therefore, the Statement and Open Balance Report accurately represented that no more than \$1,380.00 was owed from the year 2019, however in reality, DLA also maintained a creditable security deposit in the amount of \$10,500.00.

32. The Statement and Open Balance Report provided to me by Leavitt, contradicts the supposed ledger attached to Plaintiff’s Non-Payment Affidavit in Support of Default Judgment.

The Statement and Open Balance Report dated January 10, 2020 is attached hereto as Exhibit “5”.

33. From April of 2019 to March of 2020, consistent with the Statement and Open Balance Report, pursuant to Terms and the Understandings and the Agreement, and as reflected in bank statements as well as was (at least) *previously* reflected in the QuickBooks account (the “QuickBooks Account”) shared by myself, Leavitt, bookkeeper Zussy Coello, and accountant Manal Oliver & Associates, all Rent owed was paid by DLA.

34. Beginning in March of 2020, the COVID-19 pandemic began affecting South Florida area bars and restaurants.

35. Around March 15, by order of the government, bars and restaurants were ordered to be closed by State and Local Authorities.

36. On or about April 8, 2020 Kauderer and I agreed that while the Business was not operating, the rent would be adjusted to five thousand [\$5,000] per month (the “Rent Adjustment Agreement”).

37. On or about April 24 2020 Kauderer applied for Payroll Protection funds under the CARES ACT (the “PPP Funds”). Kauderer improperly applied for these funds through Churchill’s Pub LLC, however he utilized the financial information of Churchill Beverage LLC to secure the PPP Funds.

38. It was agreed by and between myself, Plaintiff and Kauderer and Leavitt that the remaining amount of PPP Funds, following the payment of outstanding payroll, would be applied to the rent for the months under the Rent Adjustment Agreement, attached hereto as “Exhibit 6 - COVID Rent Reduction Agreement” .

39. A total of \$42,551.00 in PPP Funds were provided by the government for the benefit of the Business. Approximately fourteen thousand dollars [\$14,000] of the PPP Funds were paid to employees for outstanding payroll. The remaining approximately \$27,500.00 was to be applied to the rent owed under the Lease.

40. Going into the month of August, \$19,300.03 had been paid by DLA to the Landlord pursuant to the PPP funds and Temporary Rent Reduction Agreement for the months of April – July (four months of rent payments). At this point, \$8,179.80 of PPP funds remained, which, if not applied to utilities, must be applied to the Rent. Therefore, after the August Rent is applied from the PPP funds, there would still be a balance of \$3,179.80 to be applied to the September Rent. None of the PPP Funds were ever applied to any utilities.

41. The Churchill Beverage LLC banking statements accurately reflect these transactions relating to the PPP Funds and are attached hereto as “Exhibit 7.1-7.3”.

42. Furthermore, in applying for these further CARES Act funds, Kauderer listed accounts payable in the application to include TBG (the parent company of DLA) in the amount of \$128,000.00, pursuant to professional consulting services rendered to Churchill’s Pub LLC (during the prior time when that entity owned the Pub), among other vendors.

43. Because the application for the EIDL funds relied almost exclusively on the \$128,000.00 owed to TBG, it was expressly agreed that that amount would either be paid to TBG by Kauderer or serve to off-set any Rent ever owed by DLA under the Lease. Notwithstanding this fact, DLA was current with its Rent payments.

44. On June 12, 2020, \$149,900.00 in SBAD Treas 310 funds (the “Economic Impact Disaster Loan” or the “EIDL”) pursuant to the CARES Act were deposited into the Churchill Beverage LLC bank account. According to Kauderer’s accountant, Manal Oliver (“Oliver”),

Kauderer applied for the EIDL funds using Churchill Beverage LLC's bank statements under the name Churchill's Pub LLC, because Kauderer had given Oliver this impression. In reality, Kauderer fraudulently applied for the EIDL using Churchill Beverage LLC's bank statements, but under his own personal name and social security number. However, Kauderer does not own the Business.

45. Moreover, Kauderer never paid any amount of the EIDL CARES Act funds to TBG. Kauderer also never applied any amount to off-set the rent. Instead Kauderer "loaned" the monies to his parent company Little Haiti Development Partners LP. In doing so, pursuant to our agreement, Kauderer was obligated to advance credits to DLA, to be used for future rents. Otherwise, Kauderer was misusing the CARES Act program, in violation of its strict requirements, and defrauding DLA, TBG and myself.

46. Additionally, on or about July 1, 2019 following the office located at the Property being deemed an "unsafe structure" by the City of Miami, it was agreed that the value of any and all improvements made to an additional property owned by Kauderer at 175 NE 55th Street, Miami, FL 33137, would be credited against rents owed at the Property. The value of these improvements made by DLA to the property at 175 NE 55th Street is \$76,137.00.

47. In total Kauderer, Plaintiff, and/or LHDP owe DLA/TBG at least \$204,137.00, pursuant to the EIDL Funds which were received pursuant to the \$128,000.00 owed to TBG and the \$76,137.00 in improvements to the property at 175 NE 55th Street, which are convertible to credits for any rent owed pursuant to the Agreement and all agreements set forth herein.

48. Because the Terms and Understandings and the Agreement were express, I at all times material to the Lease, reasonably relied upon the representations made by Kauderer and Leavitt on behalf of Plaintiff.

49. Attached hereto as Exhibit "8" is a ledger (the "DLA Reconciliation Ledger"), which accurately reflects all rent payments and other credits and considerations that were expressly agreed to by Kauderer and relied upon by DLA

50. Accordingly, there is no rent due or owing to Plaintiff in this action.

51. Furthermore, as reflected in the DLA Ledger a total of \$337,188.00 (Three Hundred Thirty Seven Thousand One Hundred Eighty Eight Dollars) is owed to Counter-Plaintiffs in this action.

52. The underlying eviction action is without merit or a supportable factual basis and is being used in an attempt to devalue the amounts owed to Counter-Plaintiffs.

53. As such, the underlying eviction action should be dismissed.

54. **FURTHER AFFIANT SAYETH NAUGHT.**

Signed, sealed and delivered in our presence:

_____ Franklin Dale

STATE OF _____)
) ss:
COUNTY OF _____)

The foregoing instrument was acknowledged before me, by physical presence, this _____ day of October 2020, by Franklin Dale, who is personally known to me and who did take an oath.

Notary Public
My commission expires: _____