

**27 Morton, L.P. v MDS Fashions, Ltd**

2020 NY Slip Op 33861(U)

November 20, 2020

Supreme Court, New York County

Docket Number: 155681/2020

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 IAS MOTION 14

*Justice*

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27 MORTON, L.P.,

Plaintiff,

- v -

MDS FASHIONS, LTD D/B/A JUSSARA LEE, JUSSARA  
LEE, ABC CORP., JOHN DOE, JANE DOE

Defendant.

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INDEX NO. 155681/2020

MOTION DATE 11/18/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The motion by plaintiff for partial summary judgment on the first, second, and seventh causes of action against defendant Jussara Lee and to dismiss defendant's affirmative defenses and counterclaims is granted in part and denied in part.<sup>1</sup>

The cross-motion by defendant Lee for partial summary judgment dismissing the claims against her and granting her third counterclaim is granted in part and denied in part.

**Background**

This commercial lease case arises out of premises rented by defendant MDS Fashions, LTD d/b/a Jussara Lee located in Manhattan in October 2011. The lease was for ten years and defendants operated a retail space in the ground floor of the building. Defendant Lee executed a guaranty in connection with this lease.

<sup>1</sup> Plaintiff claims that the remaining defendants have not appeared and it will be discontinuing the action against them.

Plaintiff alleges that defendants stopped paying rent in April 2020. It brings causes of action against the guarantor for money due through July 20, 2020, against the guarantor for the remaining balance of the lease, against the tenant for ejectment, against the tenant for use and occupancy and the remaining balance of the lease as well as attorneys' fees.

In opposition and in support of Lee's cross-motion to dismiss, she argues that Administrative Code § 22-1005 bars plaintiff's attempt to recover based on a personal guaranty. This provision prohibits landlords from bringing claims against guarantors for businesses that failed to pay rent due to Covid-19 mandated closures and restrictions. Lee also seeks judgment on her counterclaim for civil damages based on plaintiff's attempt to enforce the personal guaranty in spite of the Administrative Code provision.

In reply and opposition to the counterclaim, plaintiff argues that the relevant code provision did not apply to stand-alone guaranty agreements that are separate from the lease. It also claims that the September 2020 amendment is not retroactive.

## **Discussion**

The subject provision provides that:

Personal liability provisions in commercial leases.

A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:

1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):

(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;

(b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or

(c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive.

(Administrative Code of City of NY § 22-1005).

The Court finds that the above provision applies to a stand-alone personal guaranty for a commercial lease. The phrase “relating to such a lease” implicates a guaranty signed as a separate agreement.

Next, the Court must consider whether the provisions, which clearly have retroactive effect, are permissible. “Retroactive legislation is viewed with great suspicion. This deeply rooted presumption against retroactivity is based on elementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly” (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, 35 NY3d 332, 370, 130 NYS3d 759 [2020] [internal quotation and citations omitted]).

“It takes a clear expression of the legislative purpose ... to justify a retroactive application of a statute which assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits” (*id.* [internal quotations and citations omitted]).

Here, the Court finds that the Administrative Code provision at issue is permissible and retroactive. The New York City Council was well aware of the potential unfairness to landlords and it enacted this law anyway in order to protect individual guarantors whose businesses were

shut down because of Covid. And the language of this code provision (as amended in September 2020) states that it applies to defaults between March 7, 2020 and March 31, 2021. That is evidence of conscious and deliberate decision to apply this law retroactively.

Having found that the Code provision is permissible, the Court finds that it requires dismissal of the claims against Lee. There is no dispute that she operated a retail establishment for many years at that location, and that the business was ordered to cease operations in March 2020. And the alleged default, according to plaintiff, did not happen until April 2020 (which means she was paid up through March). That implicates the provisions of the subject law.

### **Counterclaims**

Defendant Lee's cross-motion and opposition do not oppose the branch of plaintiff's motion which seeks to dismiss the first and second counterclaims. Therefore, those causes of action are severed and dismissed.

With respect to the third counterclaim for damages against plaintiff stemming from its refusal to withdraw its claims against Lee in light of § 22-1005, the Court declines to grant that relief. The Court finds that the instant action does not constitute harassment as a matter of law. The fact is that the initial language in § 22-1005 created some confusion as to its applicability to separate guaranty agreements. In fact, the law was later amended to alleviate those concerns. Plaintiff was certainly entitled to bring this case and to ask the Court for a determination about the law's retroactive effect after amendment. After all, case law provides that there is an initial presumption against the retroactive effect of legislation.

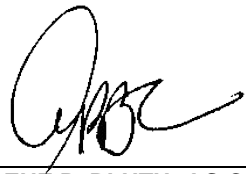
Accordingly, it is hereby

ORDERED that the motion by plaintiff for partial summary judgment is granted only with respect to its request to dismiss defendant Lee’s counterclaim and denied as to the remaining claims; and it is further

ORDERED that the cross-motion by defendant Lee is granted to the extent it sought to dismiss the claims against her and denied as to the remaining requests for relief.

Remote Conference as to remaining parties: March 5, 2021.

11/20/2020  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE