| **204 E. 38th LLC v Sons of Thunder LLC** |
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| 2020 NY Slip Op 33862(U) |
| November 20, 2020 |
| Supreme Court, New York County |
| Docket Number: 155933/2020 |
| Judge: Arlene P. Bluth |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** ***Justice*** **PART** **IAS MOTION 14**

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204 EAST 38TH LLC,

Plaintiff,

- v -

SONS OF THUNDER LLC, JOHN KIM, ABC CORP.

Defendant.

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**INDEX NO.** 155933/2020

**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

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendant John Kim is granted.

**Background**

Plaintiff is a lessor of a building located in Manhattan. It alleges that defendant Sons of Thunder entered into a ten-year written lease with plaintiff's predecessor in November 2014. Plaintiff alleges that Sons of Thunder stopped paying rent (and additional rent) in March 2020. Defendant Kim signed a guaranty in connection with the subject lease.

Kim moves to dismiss on the ground that a recently passed provision in the New York City Administrative Code bars plaintiff from seeking recovery based on a personal guaranty. He argues that this law sought to protect natural persons from liability arising from government mandated closures due to the ongoing pandemic.

In opposition, plaintiff argues that the specific provision on which Kim relies is inapplicable to the guaranty he signed. It insists that the new law only applies to a provision in a commercial lease that provides for personal liability and does not apply to a separate agreement

like a guaranty. Plaintiff also argues that this provision violates the contracts clause of the United States Constitution if it were to apply to a stand-alone guaranty. Plaintiff points out that the ambiguity in the provision made the City amend it in September 2020 to cover stand-alone guarantees, but it maintains that it cannot have retroactive application.

In reply, Kim contends that the amendment merely clarified the previous law and, therefore, should have retroactive effect. He also insists that the provision does not violate the U.S. Constitution.

**Discussion**

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

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.

The Court finds that the subject provision does not violate the contracts clause of the U.S. Constitution. "The principle is firmly established today that all contracts are subject to the police power of the State, and, when emergency arises and the public welfare requires modification of private contractual obligations in the public interest, the question is not whether legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end" (*Twentieth Century Assoc. v Waldman*, 294 NY 571, 580, 63 NE2d 177 [1945] [upholding a commercial rent control statute in the midst of World War II]).

The Court of Appeals emphasized that "In the light of the emergency which called into play the police powers of the State in this case, we are unable to say that the measures taken in the public interest were unreasonable or inappropriate to curb the evils arising from the emergency and to accomplish the public purposes declared in the statute" (*id*.).

There is no doubt that the instant pandemic, which has taken the lives of tens of thousands of New Yorkers, implicates the police powers of this state. The Court finds that the instant provision, which was intended to alleviate the personal financial burden on guarantors, is not unreasonable or inappropriate to curb the pain caused by Covid-19. The fact is that many businesses in New York City faced (and continue to face) dire financial situations due to mandated closures and restrictions. The New York City Council decided it was reasonable to enact a law to protect the personal assets of guarantors for these establishment. To be clear, the Court takes no position on the wisdom of this particular provision, it only finds that it was permissible under the relevant case law.

Next, the Court must consider whether the provisions, which clearly have retroactive effects, 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 justified. The New York City Council was well aware of the potential unfairness to landlords when it enacted this law. 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 law is permissible, the Court finds that it justifies dismissal of the claims against Kim. There is no dispute that defendant Sons of Thunder operates a restaurant in the building and that it was ordered to cease serving patrons pursuant to various pandemic-related restrictions in March 2020.

The Court observes that Mr. Kim attached checks that he claims prove that no rent was owed for March, April and May 2020 (NYSCEF Doc. No. 8). Plaintiff did not dispute this assertion in opposition. Therefore, the Court finds that the default (if one actually occurred) took place well after March 7, 2020 and § 22-1005 applies. The Court stresses that it is not making a finding about how much plaintiff might be due from defendant Sons of Thunder; it is merely concluding that the alleged default took place within the time period required to implicate the law.

**Summary**

The Court recognizes that there was some confusion about whether the initial version of this code provision applied to personal guarantees. Apparently, that is why it was amended. That amendment clarified the intention of the rule and the Court rejects plaintiff's assertions that the law should only apply to cases commenced after its enactment. The language of it suggests is applies to defaults from the beginning of the pandemic.

Accordingly, it is hereby

ORDERED that the motion by defendant Kim to dismiss the causes of action against him is granted, and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

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

| 11/20/2020 | | | | | | | |
|---|---|---|---|---|---|---|---|
| DATE | | | | ARLENE P. BLUTH, J.S.C. | | | |
| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | X | GRANTED | DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |