135 E. 57th St., LLC v Saks Inc.
2021 NY Slip Op 30270(U)
January 29, 2021
Supreme Court, New York County
Docket Number: 155234/2020
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

---X

135 EAST 57TH STREET, LLC

Plaintiff,

- v -

SAKS INCORPORATED,

Defendant.

---X

INDEX NO. 155234/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37

were read on this motion to/for DISMISS.

In this action by Plaintiff 135 East 57th Street, LLC ("Plaintiff") seeking to recover pursuant to a lease and corporate guaranty, Defendant Saks Incorporated ("Defendant"), the corporate guarantor on the lease, moves for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint in its entirety or, alternatively, for an order, pursuant to CPLR 2201, staying this action during the pendency of the moratorium on the initiation of any proceedings relating to the non-payment of rent imposed by the Governor's Executive Orders due to the ongoing COVID-19 pandemic. Plaintiff opposes this motion and cross-moves for an order, pursuant to CPLR 3211(c), converting Defendant's motion to dismiss to a motion for summary judgment pursuant to CPLR 3212 and, upon conversion, granting summary judgment in Plaintiff's favor, directing the entry of a money judgment for Plaintiff in the amount of not less than $2,748,110.36, plus interest and costs, and, further, severing Plaintiff's claims for additional damages under the lease, as well as attorneys' fees, and scheduling a hearing to determine the amount of the same. Defendant opposes the cross motion. After a review of the parties'

contentions, as well as a review of the relevant statutes and case law, the motions are denied in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The instant action arises from a breach of contract claim against Defendant in connection with a lease signed by Plaintiff, as landlord; Saks & Company, LLC, as nonparty tenant ("Tenant"); and Defendant as guarantor on the lease.

By a written lease agreement dated November 1, 2015 (the "Lease"), Plaintiff leased to Tenant a portion of the premises at 135 East 57th Street, New York, NY (the "Premises"), for a term of 16 years and three months, commencing on November 1, 2015, pursuant to Article 2, Section 2.01(a) of the Lease, for a term expiring on January 31, 2032 (Complaint ¶ 4).

As part of the Lease, Defendant executed a written guaranty (the "Guaranty") pursuant to which Defendant unconditionally guaranteed to Plaintiff full and timely payment of all minimum rent, additional rent, and all other charges and sums due and payable by Tenant to Plaintiff (*Id.* ¶ 5; *see also* Doc. 3).

In April 2020, Tenant allegedly violated the terms of the Lease by defaulting in payment of minimum rent and additional rent (Complaint ¶ 13).

On June 9, 2020, Plaintiff served a Rent Demand, demanding payment of $1,480,531.46 in alleged unpaid base and additional rent on or before June 30, 2020, requiring that Tenant "either (a) pay the Total Amount Due And Owing or (b) surrender possession of the Premises to the Landlord, in default of which, the Landlord would commence summary proceedings under the statute or an action for ejectment to recover possession of the Premises and to obtain such other relief as permitted by law" (*Id.* ¶ 14; *see also* Doc. 30).

In the complaint, Plaintiff alleged that Tenant has neither vacated nor surrendered possession of the Premises, nor has Defendant tendered the payment of rent (Complaint ¶ 15.) Further, since the service of the Rent Demand, Tenant has allegedly failed to pay the July 2020 rent (*Id.* ¶ 16).

In the complaint, Plaintiff further alleged that "Defendant, as guarantor of the Lease obligations, is itself liable for all past due minimum rent, additional rent, and incidental charges, in the amount of $1,879,839.56" and that "[p]ursuant to Paragraph 14 of the Guaranty, Defendant is liable to Plaintiff for Plaintiff's attorneys' fees in enforcing the Guaranty in connection with Tenant's default" (*Id.* ¶¶ 17, 21-25, 27).

1. The Parties' Contentions

Although Defendant does not deny that it would be liable under the Guaranty and Lease if Tenant defaulted on the Lease, it nevertheless argues that it did not breach the Guaranty given the unprecedented circumstances presented by the COVID pandemic (Doc. 14). Defendant further argues that the instant action should be dismissed on the ground that Governor Cuomo's Executive Orders ("EO") 202.28 and 202.57, extending protections to residential and commercial tenants suffering financial hardship as a result of COVID-19, prohibit this instant action (*Id.* ¶ 3).

In opposition to Defendant's motion and in support of its cross motion for summary judgment, Plaintiff argues that "the referenced [EOs] do not bar a suit for money damages against a corporate guarantor [and that] only a suit against a personal guarantor is proscribed by New York City Administrative Order" (Doc. 24). Plaintiff further argues that this is not "an eviction proceeding that arguably may be proscribed by current [EOs], nor even a threatened lease termination against Tenant" (Doc. 26 ¶ 23). Plaintiff additionally argues that "under

Paragraph 10 of the Guaranty, Landlord [might] pursue its remedies under this Guaranty concurrently with or independent of any other action or proceeding or steps taken against Tenant" (*Id.* ¶ 6 [internal quotations omitted].)

In a reply affirmation in further support of its motion, Defendant, via its counsel, makes three arguments. Defendant argues that: (1) the plain language of Executive Order 202.28 bars "initiation of a proceeding …for nonpayment of rent[,]" (2) the holding by *Prestige Deli & Grill Corp. v PLG Bedford Holdings LLC*, 2020 NY Slip Op 32370(U), *1 (Sup Ct, Kings County 2020) "fits squarely to this action[,]" and (3) "it is of no import that 57th Street LLC seeks to impose liability upon Saks Inc. under its guaranty, since that liability depends on the alleged non-payment of rent by Saks" (Doc. 35).

In opposition to Plaintiff's cross motion for summary judgment, Defendant's counsel argues that Plaintiff's cross motion is inappropriate at this stage since issue has not been joined and discovery has not yet occurred (*Id.*). Defendant further argues that "questions of fact exist regarding whether non-party [Tenant] had any obligation to pay rent during the period that it was legally prohibited from using the leased premises as contemplated by the Lease; whether [Tenant] was relieved of its rent payment obligations when [Plaintiff] could not fulfill its concomitant obligation to provide unhampered use, occupancy and possession of the leased premises; whether there has been any payment default under the Lease as [Plaintiff] alleges; and whether [Plaintiff] breached its own obligations of good faith and fair dealing under the Lease by purporting to declare [Tenant] in default at a time when no such default existed" (*Id.* ¶ 18).

In further support of its cross motion, Plaintiff argues, inter alia, that the notice requirement of CPLR 3211(c) is satisfied here as the parties charted a course for summary judgment (Doc. 36 ¶ 11).

DISCUSSION & LEGAL CONCLUSIONS

1. Legal Standard for a Motion to Dismiss

CPLR 3211(a), entitled "Motion to dismiss cause of action," states, in relevant part, that:

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> (1) a defense is founded upon documentary evidence; or …
> (7) the pleading fails to state a cause of action[.]

(CPLR 3211[a]).

On a motion to dismiss under CPLR 3211(a), the pleadings are afforded a liberal construction and the facts as alleged in the complaint are accepted as true. Moreover, the plaintiff is to be accorded the benefit of every possible inference (*Hsu v Liu & Shields LLP*, 127 AD3d 522, 523 [1st Dept 2015] [internal citations omitted]). Thus, in a determination of legal sufficiency under 3211(a)(7), the facts alleged in the complaint will be assumed to be true, given all favorable inferences, and only then considered to see if they fit "within any cognizable legal theory" (*Leon* v *Martinez*, 84 NY2d 83, 87-88 [1994]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211 (a)(7) motion "to remedy defects in the complaint" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [2d Dept 1997] [internal quotations marks and citations omitted]; *see also Warberg Opportunistic Trading Fund, LP. v GeoResources, Inc.*, 112 AD3d 78, 84 [1st Dept 2013]).

"On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1), a dismissal is proper only when the documentary evidence submitted establishes a defense to the asserted claims as a matter of law" (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 189 [1st Dept 1999] [internal quotation marks and citations omitted]). The party seeking dismissal has the burden of submitting documentary evidence resolving "all factual issues as a matter of law, and conclusively dispos[ing] of the plaintiff's claim" (*Sullivan v State*, 34 AD3d 443, 445 [2d Dept

2006] [internal quotation marks and citations omitted]). In order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]).

CPLR 3211(c), entitled "Evidence permitted; immediate trial; motion treated as one for summary judgment," provides in relevant part:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(CPLR 3211[c]).

"There are, however, three exceptions to the requirement of notice. If the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides, it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so. Such is often times the case in declaratory judgment actions involving an issue of statutory construction" (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320-21 [1st Dept 1987] [internal citations omitted]). "The second exception is when a request for CPLR 3211(c) treatment is specifically made by both sides; the third when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*Id.* at 320-21 [internal citations omitted]).

2. Legal Standard for a Motion for Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853

[1985] [citations omitted]). Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is well-established that "[t]his burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"[A]n affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value" (*New York Community Bank v Bank of Am., N.A.*, 169 AD3d 35, 38 [1st Dept 2019], *lv to appeal denied*, 33 NY3d 908 [2019]).

3. Analysis

Here, Plaintiff alleges as a first cause of action "Breach of Contract/Money Damages" (Complaint ¶ 21-25). To establish a prima facie case of breach of contract, the plaintiff must plead facts that show: (1) the formation of a contract between the plaintiff and defendant, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages (*Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] [internal quotations omitted]; *Biallas v Jack Simpson LLC*, 2011 N.Y. Slip Op. 34025[U] [N.Y. Sup Ct, New York County 2011]).

Plaintiff has alleged all of these elements, claiming that: it entered into a contract with Defendant whereby the latter unconditionally guaranteed to Plaintiff full and timely payment of all minimum rent, additional rent, and all other charges and sums due and payable by Tenant to Plaintiff, as landlord, pursuant to the Lease; Tenant violated the terms of the Lease by defaulting

in payment of minimum rent and additional rent beginning in April 2020 and, as such, Defendant, as guarantor of the Lease obligations, is itself liable for all past due minimum rent. Plaintiff, therefore, has pleaded a prima facie cause of action for breach of contract.

Defendant argues, however, that Tenant's failure to pay rent under the Lease cannot or shall not constitute a default under the Lease, given the extraordinary and unprecedented circumstances presented by the ongoing COVID-19 pandemic that adversely affected its performance, and that the instant action violates EO 202.28.

Executive Order 202.28, which is cited by Defendant, provides, in relevant part, that:

> There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

(EO 202.28).

Executive Order 202.28 prohibited the initiation or enforcement of an eviction against a commercial tenant for nonpayment of rent until August 20, 2020, and EO 202.81 extended this prohibition until January 31, 2021. Thus, Plaintiff is prohibited from initiating "a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent … due to the COVID-19 pandemic" until January 31, 2021 (EOs 202.28 & 202.81.) However, these EOs do not provide guidance regarding corporate guaranties in connection with commercial tenancies. On May 13, 2020, the New York City Council passed bill number Int. 1932-2020, effective May 26, 2020, amending the NYC Administrative Code to prohibit enforcement of personal guarantees in commercial leases under certain circumstances (Int. No. 1932-A). The law applies to defaults that occurred between March 7, 2020 and September 30,

2020, and only for personal guaranties by "natural persons who are not the tenant under" the "commercial lease or other rental agreement involving real property" (*Id.*).

Although the pandemic presents challenges and economic hardships to commercial tenants in the City of New York, neither the executive nor the legislative branches have proscribed the type of contractual remedy against Defendant at issue here, and that, therefore, Plaintiff here may obtain a judgment for unpaid rent under the specific facts of this case. Accordingly, the branch of the Defendant's motion to dismiss with respect to the First of Action (Breach of Contract/Money Damages) is denied.

To the extent that Defendant moves to dismiss Plaintiff's Second Cause of Action (Attorneys' Fees), this is likewise denied. Plaintiff sufficiently alleges that Paragraph 14 of the Guaranty renders Defendant liable for Plaintiff's attorneys' fees incurred in enforcing the Guaranty in connection with Tenant's default (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]).

Further, Plaintiff's cross motion for an order pursuant to CPLR 3211(c) is denied since (1) issue has not yet been joined and (2) Plaintiff has failed to establish that an exception to the notice requirement applies (*Drezin v New Yankee Stadium Community Benefits Fund, Inc.*, 94 AD3d 542, 542 [1st Dept 2012]; *Four Seasons Hotels Ltd.*, 127 AD2d at 320-21). Even assuming, arguendo, that Plaintiff has established an exception to the notice requirement and further established prima facie entitlement to summary judgment, Defendant raised issues of fact relating to the alleged default.This Court has considered the parties' remaining arguments and finds them unavailing.

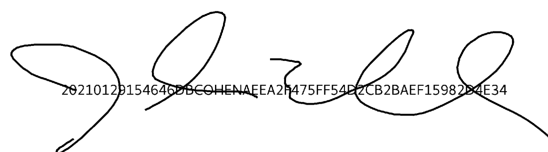
CONCLUSION

Therefore, it is hereby:

ORDERED that the motion to dismiss by defendant SAKS INCORPORATED is denied in all respects; and it is further

ORDERED that the cross motion by plaintiff 135 EAST 57TH STREET, LLC is denied in all respects; and it is further

ORDERED that the parties are to appear for a virtual Preliminary Conference with the Court on February 8, 2021 at 12:00 Noon.



1/29/2021	DAVID BENJAMIN COHEN, J.S.C.
DATE	

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	