

Walsam 47th St LLC v Sett
2022 NY Slip Op 30725(U)
March 7, 2022
Supreme Court, New York County
Docket Number: Index No. 160178/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

WALSAM 47TH ST LLC

Plaintiff,

- v -

DHANANJAY SETT,

Defendant.

-----X

INDEX NO. 160178/2020

MOTION DATE 08/26/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

Plaintiff Walsam 47th Street LLC brings this action for breach of contract against Dhananjay Sett, the personal guarantor of a commercial lease agreement between Plaintiff and non-party Esha Jewels, Inc. In motion sequence 001, Plaintiff seeks summary judgment on its causes of action for unpaid sums due and owing under the lease and attorneys' fees. The motion is fully submitted.

Background

Plaintiff is the owner and landlord of the building located at 5 East 47th Street, New York, New York. Pursuant to a lease dated August 30, 2017, Plaintiff leased the sixth floor to Esha Jewels, Inc. ("Esha") for a term of five years. (NYSCEF Doc No. 11, Lease.) Defendant Dhananjay Sett signed a personal guaranty for the lease. (NYSCEF Doc No. 12, Guaranty.)

Plaintiff commenced this action against Sett on November 24, 2020, alleging that Esha owed \$150,404.97 in rent, tax, water, and late charges. (NYSCEF Doc No. 1, Complaint, at ¶ 13.) Defendant filed his answer on February 5, 2021, setting forth 13 affirmative defenses. (NYSCEF Doc No. 6, Answer.)

Now, Plaintiff moves to amend the damages sought to \$231,051.98, representing charges accruing since the inception of this action, to dismiss the affirmative defenses, and for summary judgment. (NYSCEF Doc No. 7.) Plaintiff submits the affidavit of Plaintiff's property manager and a rent ledger. (NYSCEF Doc Nos. 8, 13.) Additionally, with its reply papers, Plaintiff submits a second updated rent ledger demonstrating arrears in the amount of \$255,911.08. (NYSCEF Doc No. 21.)

In opposition, Defendant argues, in pertinent part, that New York City Administrative Code § 22-1005 (the "Guaranty Law") prohibits the enforcement of the personal guaranty against him because Esha was a non-essential jewelry retail store and was forced to shut down as a result of the COVID-19 pandemic. (NYSCEF Doc No. 17, Opposition.)

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012].) Granting a motion for

summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].)

“[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-47 [1st Dept 2012], citing *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1st Dept 1991].)

Here, Plaintiff has met its initial burden for summary judgment, as it has submitted the affidavits of Peter Weiss, its property manager, who has personal knowledge of the merits of Plaintiff's claim for breach of contract (NYSCEF Doc Nos. 8, 19), in addition to other supporting documentary evidence, including the verified complaint, the lease, the guaranty, and the rent ledger. The court finds that the guaranty is clear and unambiguous and establishes Plaintiff's entitlement to judgment.

Further, the court finds that Defendant has failed to raise an issue of fact in response or prove his entitlement to the protections of the Guaranty Law, which renders unenforceable a personal guaranty for a commercial lease if:

[1](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; ... [and]

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 June 30, 2021, inclusive.

Executive Order 202.6 directed “[a]ll businesses and non-for-profit entities” to utilize telecommuting or work from home procedures and directed employers to “reduce the in-person

workforce at any work locations by 50%”, but further provided that essential businesses were “not subject to the in-person restrictions.” Here, Defendant argues that he is entitled to the protections of § 22-1005, as Esha was a “non-essential retail [jewelry] establishment that was subject to in-person limitations” pursuant to Executive Order 202.6. (NYSCEF Doc No. 17, Opposition, at 3.)

However, the lease between Plaintiff and Esha states that the premises shall only be used and occupied as a jewelry “wholesale/auction office.” (NYSCEF Doc No. 11, at ¶ 2.) As such, Esha was prohibited from operating as a retail establishment, and Defendant otherwise fails to prove that Esha was a non-essential retail establishment.

The remainder of Defendant’s affirmative defenses are unavailing (*see 274 Madison Co. LLC v Carnegie National Abstract LLC*, 2021 WL 4264007 [Sup Ct, NY County 2021]), and the portion of Plaintiff’s motion seeking their dismissal is granted.

The court also finds that Plaintiff is entitled to reasonable attorneys’ fees pursuant to the terms of the guaranty. (NYSCEF Doc No. 12.) However, Plaintiff has not submitted an attorneys’ affidavit of services or a bill of costs. As such, it is hereby

ORDERED that Plaintiff’s motion for summary judgment is granted, and Defendant Dhananjay Sett is liable for damages arising from the default of Esha Jewels, Inc., in the amount of \$255,911.08; and it is further

ORDERED that Plaintiff is directed to electronically file an attorney’s affidavit and bill of costs in support of its request for attorneys’ fees within 15 days of the date of this order for this court’s review; and it is further

ORDERED that Defendant's affirmative defenses are dismissed.

3/7/22
DATE


WILLIAM PERRY, 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