SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR ENGORON** **PART** **37**

Justice

----------X

DIAMOND 47 NAILS INC.,

Plaintiff,

- v -

L'ENVIE HAIR STUDIO, INC., VENERA CERANIC,

Defendants.

----------X

INDEX NO. 654537/2021

MOTION DATE 03/11/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29 were read on this motion for REARGUMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion to reargue is granted and, upon reargument, this Court adheres to its original determination.

Background

This is a relatively straightforward commercial license case with a City Council-induced COVID-19 complication.

On December 30, 2014, plaintiff, Diamond 47 Nails Inc., as licensor, entered into a license agreement ("The License Agreement") and guaranty ("The Guaranty") with defendants L'Envie HairStudio, Inc., ("L'Envie" or "L'Envie HairStudio"), as licensee, and Venera Ceranic ("Guarantor"), as guarantor, so L'Envie could occupy a portion of the ground floor of 140 East 46th Street, New York, New York, ("The Premises") leased by plaintiff from the non-party landlord. NYSCEF Doc. Nos. 3 and 4.

Beginning April 1, 2020, L'Envie failed to meet its license obligations, causing it to default on The License Agreement. NYSCEF Doc. No. 21. On July 21, 2021, plaintiff sued to recover license fees, plus interest, costs, and attorneys' fees. NYSCEF Doc. No. 1.

In a Decision and Order dated January 21, 2022, this Court granted plaintiff's motion for a default judgment against L'Envie HairStudio only, severed plaintiff's request for attorneys' fees, and denied plaintiff's motion for a default judgement against Guarantor, pursuant to the Administrative Code of the City Of New York § 22-1005 (L.L. 2020/55, 5/26/2020; Am. L.L. 2020/098, 9/28/2020, eff. 9/28/2020; Am. L. L. 2021/050, 4/25/2021, retro. eff. 3/31/2021) ("Guaranty Law"). NYSCEF Doc. No. 25.

Plaintiff now moves, pursuant to CPLR 2221(d), to reargue the portions of the decision in which this Court denied a default judgment and dismissed the complaint as against Guarantor. NYSCEF Doc. No. 28.

Plaintiff argues that 1) this Court should not have applied the Guaranty Law, as it is an affirmative defense; and 2) even if the Guaranty Law is a statutory defense, this Court misapprehended its scope, as it should only apply for obligations that occurred between March 7, 2020, and June 30, 2021. NYSCEF Doc. No. 29.

Discussion

On March 19, 2020, in the early days of the ongoing global COVID-19 pandemic, then-New York Governor Andrew M. Cuomo signed Executive Order 202.7, ordering, inter alia, that "[e]ffective March 21, 2020, at 8 p.m. and until further notice, all barbershops, hair salons … will be closed to members of the public."

On May 13, 2020, the New York City Council amended the Administrative Code of the City of New York to add § 22-1005, titled "Personal liability provisions in commercial leases," which, as later amended and as relevant here, reads:

> 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):
>
> …
>
> (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 June 30, 2021, inclusive.

i. Is the Guaranty Law an Affirmative Defense?

As an initial matter, plaintiff argues that a defendant must appear and affirmatively assert the Guaranty Law in order for it to apply, citing iPayment, Inc. v. Silverman, 146 NYS3d 51 (1st Dep't 2021) (noting "defendants never asserted that the nonparty subtenant ceased operations or closed to the public as a result of those orders") and 230 Fifth Ave. Assoc., LLC v. Am Home Textiles, 2021 NY Slip Op 32120(U) (Sup Ct, NY County) (declining to assert Guaranty Law on behalf of defaulting defendants).

Both cases are easily distinguishable, as in each whether the defendants satisfied any of the conditions of the Guaranty Law's first element was not readily apparent: in iPayment the lease was for "executive and administrative office use," while in 230 Fifth the lease was for "Office and Showroom for Wholesale and Display of home textile products, and for no other purpose."

Here, in contrast, The License Agreement is explicit that L'Envie HairStudio was to use its licensed portion of The Premises only for "the operation of a hair salon at which Licensee shall offer hair salon type services and the like... it is of the utmost importance that the services offered for sale by Licensee be in keeping with Licensor's image and be hair related." NYSCEF Doc. No. 3. Additionally, the affidavit of plaintiff's president is explicit that L'Envie HairStudio "leased premises to provide hair salon-type services." NYSCEF Doc. No. 19 ¶ 3.

Further, despite language in iPayment and 230 Fifth implying otherwise, nothing in the Guaranty Law says that tenant must have "*actually* ceased or closed to the public as a result of COVID-19-related executive orders" for the statute to apply, as plaintiff argues, only that they were "*required* to close to members of the public" under one of those orders (emphasis added). See also 86 Commercial LLC v 86 Avanti Nail & Spa, Inc., 2021 NY Slip Op 30956(U), *2 (Sup Ct, NY County) (noting action against Nail Salon's guarantor violates Guaranty Law).

Additionally, plaintiff provides plenty of invoices showing that the default in licensee payments here started in April 2020 (which clearly falls between March 7, 2020, and June 30, 2021) and the affidavit of service upon Guarantor shows that, even though she has not appeared before this court, Venerea Ceranic is a natural person (specifically a white, female, natural person with blonde hair and no glasses, between the ages of 36-50). NYSCEF Doc. No. 15.

Therefore, this Court did not err in its prior Decision and Order, and the fact that Guarantor has not appeared before this Court is irrelevant to the applicability of the Guaranty Law on her personal liability for the commercial lease in question: this case unquestionably involves a natural person (Guarantor) who made a personal guaranty (The Guaranty) on a commercial rental agreement (The License) for real property (The Premises) which is now unenforceable as a matter of law because the tenant (L'Envie HairStudio) satisfies both elements of the Administrative Code of the City of N.Y. § 22-1005 having been *required* to shut down by a specified Executive Order (202.7) and having gone into default *during* the statutorily proscribed time period (on April 1, 2020).

ii. Defaults Are Continuous, or: How Long Does the Guaranty Law Apply?

Having shown why the Guaranty Law makes the instant personal guaranty between plaintiff and Guarantor unenforceable, the question then becomes: for how long will that unenforceability continue?

Plaintiff argues that the "plain language of the Guaranty Law limits its application to 'obligation[s that] occurred between March 7, 2020 and June30, 2021.' Guaranty Law ¶2. Thus, a personal guarantor is not excused from liability for defaults that occurred before March 7, 2020 or after June 30, 2021."

But plaintiff's selective reading of the statute omits crucial language and belies the purpose of the section it quotes, which reads in full:

> "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."

Administrative Code of City of N.Y. § 22-1005 (2) (emphasis added).

Clearly the plain language of section two of the Guaranty Law does not, as plaintiff argues, outline a timeframe in which a personal guaranty of a commercial lease is unenforceable. Instead, it merely outlines a time period where an *initial* default would trigger the ongoing protections of the Guaranty Law. See 3rd and 60th Assoc. Sub LLC v. Third Ave. M & I, LLC, 199 AD3d 601, 601 (1st Dep't 2021) ("the critical time frame for determining when the protections of Administrative Code § 22-1005 attach is the time of the 'event causing such natural persons to become … liable'").

Notably, the Guaranty Law is absolutely silent on the question of if (or when) a guaranty of a commercial lease whose continuing default began during the outlined period becomes enforceable again.

Plaintiff argues that "New York courts that have analyzed this statute have repeatedly recognized that its prohibition against enforcement of personal guarantees is not applicable when the 'alleged liability' arose outside the period defined in the Guaranty Law." But the analysis in the cases cited is neither controlling nor convincing; the period of time described in the Guaranty Law simply does not say what plaintiff wants it to say and those cases it references cite to no authority saying it does. What is more, this Court has been unable to find any convincing argument in the evolving Guaranty Law caselaw that says otherwise.

Meanwhile, the "declaration of legislative intent and findings" attached to the second amendment of the Guaranty Law explains that its purpose is to protect the small businesses and their owners, the beating heart of New York City, because "[i]f these individual owners and natural persons are forced to close their businesses permanently now or to suffer grave personal economic losses like the loss of a home, the economic and social damage caused to the city will be greatly exacerbated and will be significantly worse than if these businesses are able to temporarily close and return or, failing that, to close later, gradually, and not all at once."

To read the Guaranty Law as plaintiff wants would let landlords make a runaround of the City Council's intentions by allowing them to come back and hold personal guarantors liable for the remainder of ten-or-twenty-year commercial leases now long-since abandoned. All the Guaranty Law would have done is delayed the grave personal economic losses the City Council was explicitly trying to avoid.

To be clear: while this Court is deeply sympathetic with plaintiff's position – particularly since plaintiff appears to be a small business itself – that sympathy does not change the language of the Guaranty Law; nor does it give this Court license to read language into it that is not there; nor does it square with the legislative intent behind the statute, for an in-depth history of which this

Court refers the reader to section II(B) of Melendez v City of N.Y., 16 F4th 992, 1004-1008 (2d Cir 2021) (remanding question of Guaranty Law's constitutionality).

Therefore, as L'Envie defaulted on The License Agreement on April 1, 2020, and, despite numerous partial payments between then and September 2021, has never cured that default, pursuant to the Administrative Code of the City of N.Y. § 22-1005, the personal guaranty signed by Guarantor on that agreement is unenforceable for as long as the initial default causing them to be liable occurred during the proscribed time.

All of the above notwithstanding, this Court notes that plaintiff and other commercial landlords are hardly without recourse. To start, the instant Decision and Order being reargued already awarded plaintiff a default judgment against L'Envie HairStudio in the amount of $89,965.02, plus interest. And plaintiff has filed a petition for eviction in New York Civil Court against L'Envie that is currently pending. Diamond 47 Nails, Inc. v. L'Envie Hair Studio Inc., Case No. LT-3000408-22/NY.

And finally, were a landlord simply to forgive defaults arising during the proscribed period and assert a guaranty for a default starting, say, July 1, 2021, the Guaranty Law would not apply, and any personal guarantors would be liable again.

Conclusion

Thus, for the reasons stated hereinabove, after granting petitioner's motion for reargument, this Court adheres to its prior Decision and Order dated January 21, 2022.

3/17/2022
DATE

ARTHUR ENGORON, 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