SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY **PART** 28M

Justice

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MOZZY, INC. F/K/A BAMFORD WATCHES, INC.,

Plaintiff,

- v -

SK IRONSTATE LLC,SCOTT SHNAY

Defendant.

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INDEX NO. 650218/2021

MOTION DATE 02/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 59

were read on this motion to/for DISMISSAL.

Defendant Scott Shnay ("defendant Shnay"), filed this motion for an Order, pursuant to *CPLR §3211 (a)(1) and (a)(7)*, to dismiss the plaintiff's complaint. Plaintiff filed opposition.

Co-defendant, SK Ironstate LLC, subleased the subject premises, room 901 in the building located at 110 Greene Street, New York, N.Y. ("the premises"), from the plaintiff, Mozzy Inc.("plaintiff"). In April 2018, the movant defendant Shnay executed a "Good Guy Guaranty" to the premises, and was the guarantor to the sublease of the premises with the plaintiff.

Defendant Shnay's motion seeks to dismiss the complaint in its entirety because, *inter alia*, plaintiff failed to state a cause of action. In support of the motion, defendant argues that the plaintiff's continuance of this action constitutes "commercial-tenant harassment" by law, and defendant Shnay also requests this Court to direct a hearing to determine the reasonable legal fees incurred by defendant to defend himself in this action. In addition, defendant Shnay argues that the required termination was not given to the tenant, and that the tenant vacated the premises on September 8, 2020. Defendant Shnay contends that when the tenant vacated the premises, defendant Shnay, as the guarantor, would have been liable for the August 2020 rent, and a portion of the September 2020 rent.

Defendant Shnay further argues that he is not liable for any rent payment under the Good Guy Guaranty and cites the enactment of *New York City Administrative Code §22-1005,* which barred the enforcement of personal guaranty provisions in commercial leases in New York City if: (a) the Guarantor is a natural person, and (b) the subject premises was a non-essential establishment subject to in-person limitations under guidance issued by the state Department of Economic Development pursuant to Executive Order No. 202.6, and the tenant's default occurs any time from March 7, 2020 through September 30, 2020. Defendant Shnay argues that the new law amended the *New York City Administrative Code Section 22-902*, and it now constitutes a "form of tenant

harassment" for a landlord to attempt to enforce a personal guaranty in a commercial lease that he or she knows or should know is unenforceable under *New York City Administrative Code §22-1005*.

In opposition, plaintiff submits the affidavit of defendant Shnay, and argues, *inter alia*, that defendant Shnay does not satisfy the conditions of *New York Administrative Code §22-1005 (1)(a)(b) and (c)*, and that the "Good Guy Guaranty" is fully enforceable as to movant-defendant. The plaintiff argues that the defendant SK Ironstate LLC used the subject premises as a real estate managing firm, and submitted the affidavit of Scott Shnay, where defendant admitted that their business was a real estate managing firm.

Plaintiff cites to *New York Administrative Code §22-1005 Personal Liability provisions in commercial leases,* which states that:

> 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.

New York Administrative Code §22-1005. (Emphasis added).

Here, plaintiff argues that the defendant, which served as a real estate firm, was not required to cease serving patrons food or beverage, that SK Ironstate is not a restaurant or bar, not a facility authorized to conduct video lottery gaming, or casino gaming and not a fitness center, and not a movie theater. Therefore, the plaintiff submits that defendant Shnay does not satisfy the conditions set forth in *New York Administrative city Code §22-1005 (1)(a)*. Additionally, plaintiff argues co-defendant SK Ironstate was not 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 202.6 issued by the governor on March 18, 2020. Plaintiff states defendant is not a retail establishment at all which sells goods or services to the general public and cannot satisfy *New York Administrative city Code §22-1005 (1)(b)*. Further, plaintiff argues co-defendant SK

Ironstate LLC was not required to close to members of the public under Executive Order 202.7. Plaintiff states SK Ironstate was not a barbershop, hair salon, tattoo or piercing parlor, nail technician, cosmetologist, esthetician, laser hair removal service or a personal care service that closed to the public. As such, the defendant does not satisfy *New York Administrative city Code §22-1005 (1)(c).*

Plaintiff argues that defendant Shnay, as Guarantor, does not satisfy the conditions set forth in *New York City Administrative Codes §22-1005 and §22-902*, and thus, defendant Shnay is liable to plaintiff pursuant to the Good Guy Guaranty.

Under *New York City Administrative Code §22-902:*

> A landlord shall not engage in commercial tenant harassment. Except as provided in subdivision b of this section, commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property, and (ii) includes one or more of the following: 1)using force against or making express or implied threats that force will be used against a commercial tenant or such tenant's invitee; 2) causing repeated interruptions or discontinuances of one or more essential services; 3) causing an interruption or discontinuance of an essential service for an extended period of time; 4) causing an interruption or discontinuance of an essential service where such interruption or discontinuance substantially interferes with a commercial tenant's business; 5)repeatedly commencing frivolous court proceedings against a commercial tenant; 6) removing from a covered property any personal property belonging to a commercial tenant or such tenant's invitee; 7) removing the door at the entrance to a covered property occupied by a commercial tenant; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying a key to the new lock to the commercial tenant occupying the covered property; 8) preventing a commercial tenant or such tenant's invitee from entering a covered property occupied by such tenant; 9) substantially interfering with a commercial tenant's business by commencing unnecessary construction or repairs on or near covered property; 10) engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business; 11) threatening a commercial tenant based on (i) such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, uniformed service, sexual orientation, alienage or citizenship status, status as a victim of domestic violence or status as a victim of sex offenses or stalking, or (ii) the

> commercial tenant's status as a person or business impacted by COVID-19, or the commercial tenant's receipt of a rent concession or forbearance for any rent owed during the COVID-19 period [.]

New York City Administrative Code §22-902

Plaintiff argues that it has not engaged in commercial tenant harassment pursuant to *New York Administrative Code §22-902* because defendant has already vacated and abandoned the subject premises in breach of the Sublease, therefore, plaintiff has done nothing to threaten or harass defendant and plaintiff is entitled to enforce the terms of the Guaranty.

DISCUSSION

"[O]n a pre-answer motion to dismiss pursuant to *CPLR §3211*, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference." *Barker v. Amorini*, 121 A.D. 3d 823, 824 (2d Dep't 2014). However, "bare legal conclusions are not presumed to be true." *Id.* When evaluating a *CPLR §3211(a)(7)* motion, the court must " [l]ook to the substance rather than to the form. Such a motion is solely directed to the inquiry of whether or not the pleading, considered as a whole, 'fails to state a cause of action'. Looseness, verbosity and excursiveness, must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading." *Foley v. D'Agostino*, 21 A.D. 2d 60, 64 (1st Dept 1964).

After a review of the defendant's motion and supporting documents, as well as the plaintiff's opposition and supporting documents, this Court hereby denies the defendant's motion to dismiss the complaint. This Court finds that the plaintiff has stated a cause of action for breach of contract. Here, defendant Shnay has not satisfied the conditions set forth in *New York City Administrative Code §22-1005* to absolve him from his liability as a guarantor to the sublease of the premises. Pursuant to the Agreement of Sublease executed on April 2, 2018, between plaintiff, and defendant SK Ironstate LLC, the subject premises was contracted to be used and occupied "for the sole purpose of executive and general office use." (*See, NYSCEF Doc. No. 18, Agreement of Sublease*). The defendant was using the premises as a real estate management firm. Therefore, the defendant did not qualify for the exemption privileges, under *New York Administrative Code §22-1005*, as a patron serving food or beverage or as a non-essential retail establishment serving consumers goods; and was not required to close its business to members of the public during the pandemic.

Here, the plaintiff has stated a cause of action for breach of contract and demonstrated that defendant Shnay, as the Guarantor, is liable for defendant SK Ironstate's breach of the sublease. According to the Good Guy Guaranty, defendant Shnay must provide sixty days-notice to plaintiff before vacating the premises, and must have no outstanding rent or additional rent owed to plaintiff at time of the surrender of the premises. Defendant Shnay admitted that he would be liable to pay for the rent due for the month of August 2020, as well as the first eight days of September 2020, but that the "Guaranty law" freed him from this obligation. To the contrary, the plaintiff demonstrated that the "Guaranty law" does not free defendant Shnay from his obligation because defendant Shnay does not fall into any of the several categories under the government orders

pursuant to *New York City Administrative Codes §22-1005.* Specifically, paragraph six of the Sublease states that, "Sublessee shall use and occupy the premises for the sole purpose of executive and general office use." Defendant used the premises as a real estate managing firm, as stated in the affidavit of Scott Shnay in support of his motion to dismiss, and was not a patron serving food or beverage, was not a retail establishment serving consumers goods, nor was required to close to members of the public under Executive Order 202.7. As mentioned by plaintiff in their opposition to the motion, defendant was not one of the businesses that qualified under *§22-1005*. Thus, because defendant has failed to pay the rent and additional rent before the date of surrender and was in default of the Sublease, plaintiff has properly stated a claim for breach of contract under the terms of the sublease.

Moreover, the defendant's claim that plaintiff has committed harassment under the Commercial Tenant Harassment Law is without merit. Commercial Tenant Harassment is defined as "any act or omission by or on behalf of a landlord that is intended to cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property[.]" *See, One Wythe LLC v. Elevations Urban Landscape Design Inc*, 67 Misc. 3d 1207(A) (Civ. Ct. 2020). Plaintiff has demonstrated that they have not committed harassment since defendant Shnay failed to satisfy criteria under *New York City Administrative Codes §22-1005*, and the plaintiff's letters to defendant Shnay requesting payment under the Guaranty agreement does not qualify as harassment. Plaintiff has not done anything to cause defendant to vacate or surrender the subject premises, nor has defendant had to waive any rights in relation to the property. Thus, this Court finds plaintiff has not harassed defendant under the Commercial Tenant Harassment Law.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is DENIED in its entirety; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the all parties with notice of entry.

This constitutes the Decision and Order of the Court.

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8/23/2022
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE