

<b>Broome 302 Realty LLC v Omar's LES LLC</b>
2022 NY Slip Op 33780(U)
November 4, 2022
Supreme Court, New York County
Docket Number: Index No. 651731/2022
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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BROOME 302 REALTY LLC,  
  
Plaintiff,

INDEX NO. 651731/2022

MOTION DATE 07/18/2022

MOTION SEQ. NO. 001

- v -

OMAR'S LES LLC,JOHN MINGIONE, XYZ PARTIES  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of allegations that defendants breached its commercial lease agreement. Plaintiff now moves for summary judgment on it first and second causes of action, as against defendants, tenant, Omar’s LES LLC and guarantor, John Mingione, as well as dismissal of defendants’ counter claims and affirmative defenses. Defendants oppose the instant motion. For the reasons set forth below, the motion is granted.

**Facts**

The parties entered into a written lease agreement, for the premises located at 302 Broome Street, New York, New York, dated August 1, 2019 with a term which commenced, after the expiration of a six-month free rent period, on February 1, 2020 and expired on January 31, 2030. Defendants provided plaintiff a security deposit in the amount of \$100,000.00, along with a personal guaranty which was executed on August 1, 2019.

On March 7, 2020, approximately one month after commencement of the lease term which began on February 1, 2020, then Governor Cuomo, declared a State of Emergency pursuant to the COVID-19 pandemic. Defendant, tenant, maintained possession after March

2020, up until March 2022. Defendants made three payments to the landlord, first payment of \$25,000.00 in or around February 10, 2020, second payment of \$25,000.00 made in or around March 17, 2020 and the third payment of \$6,250.00 in or around November 3, 2020. In March of 2022, defendants declared to the landlord that the lease was terminated and on March 17, 2022, the landlord advised defendants that it was repossessing the premises.

### **Summary Judgment Standard**

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

### **Discussion**

Preliminarily, it must be noted that the portions of plaintiff's motion that sought dismissal of the counterclaims and affirmative defenses is granted without opposition. In support of its motion, plaintiff annexes the subject lease, the rent statement and the affidavit of an executive of plaintiff, among other things.

In opposition to the motion defendants contend that the personal guaranty is unenforceable as a matter of law and that the plaintiff urged defendants to stay in the premises so that its liquor license could be preserved for use by the next tenant and that plaintiff would not

seek any damages from the tenant or the guarantor. Defendants contend that these allegations create a question of fact which warrant denial of plaintiff's motion.

As plaintiff specifically seeks damages from the guarantor outside of the time frame specified in the Guaranty Law, thus this claim is not unenforceable as a matter of law and the Court rejects this argument.

As to defendants' contention that it is excused from its obligations under the lease and guaranty because the pandemic and the ensuing government restrictions rendered performance of the lease and guaranty impossible, the Court rejects this argument. This is not the law in this Judicial Department, or elsewhere that the Court is aware. The First Department in *Gap, Inc. v 170 Broadway Retail Owner*, held that absent any provision in the lease that stated otherwise, reduced revenue does not render performance of the lease impossible (195 AD3d 575, 577 [1st Dept 2021]) internal citations omitted.

Plaintiff has established its entitlement to judgment as a matter of law. Defendants have failed to substantively oppose the arguments in plaintiff's papers and does not dispute that it retained the premises without payment, and that any purported changes made to the lease should have been in writing, pursuant to the unambiguous terms of the lease. The Court has reviewed defendants remaining contentions and finds them unavailing. Accordingly, it is hereby

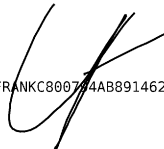
ORDERED that plaintiff motion for summary judgment as to the first and second causes of action are granted; and it is further

ORDERED that the plaintiff is entitled to damages against the defendants jointly and severally in the amount of \$481,290.00 with interest to accrue at 12% *per annum* based on the subject contract and the plaintiff is entitled to damages further as against defendant Omar's LES

LLC for an additional \$187,742.00 with interest to accrue on such amount at the contract rate of twelve percent (12%) per annum; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the remaining claims of the Complaint are severed and continue.

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11/4/2022  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE