SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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METROPOLITAN TRANSPORTATION AUTHORITY, ACTING BY AND THROUGH METRO-NORTH RAILROAD COMPANY,

Plaintiff,

- v -

JMG RESTAURANT GROUP LLC D/B/A LA CHULA, JULIAN MEDINA, and FERNANDO DELFIN,

Defendants.

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INDEX NO. 450329/2021

MOTION DATE 08/13/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 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, and 35

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants JMG Restaurant Group LLC ("tenant") and Julian Medina ("Medina," and together "defendants")[1] on liability on the first, second, third, and fourth causes of actions, for the reasons set forth in the moving and replay papers (NYSCEF Doc. Nos. 10, 19, 34) (and the exhibits attached thereto), in which the court concurs to the extent set forth below.

In this commercial landlord-tenant action, plaintiff Metropolitan Transportation Authority ("MTA") has established *prima facie* entitlement to summary judgment under the lease against tenant by submission of "the existence of the lease . . . the tenant's failure to pay the

[1] Plaintiff failed to effectuate service on defendant Fernando Delfin and seeks no relief against him (Plaintiff's Mem., NYSCEF Doc. No. 19 at 3 n 1).

rent, the amount of the underpayment, and the calculation of the amounts due under the lease" (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). The unambiguous provisions of the lease require defendant to pay rent "without setoff, deduction, counterclaim or previous demand therefor" (Lease, NYSCEF Doc. No. 11, § 4.1). Additionally, MTA has established *prima facie* entitlement to summary judgment against Medina under the guaranty by submission of the guaranty itself, proof of the underlying debt against tenant, and Medina's failure to pay (*W. & M. Operating, L.L.C. v Bakhshi*, 159 AD3d 520, 521 [1st Dept 2018]). Both the lease and guaranty provide for recovery of reasonable attorneys' fees (NYSCEF Doc. No. 11, § 17.7[b]; Guaranty, NYSCEF Doc. No. 12 at 1).

In opposition, defendants do not raise a triable issue of fact as to liability. Regarding defendants' assertion of defenses of impossibility of performance, frustration of purpose, and *force majeure* (second affirmative defense), the Appellate Division, First Department, has largely established that such defenses are not implicated by temporary closures and reduced capacity as a result of the COVID-19 pandemic (*e.g., Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept] ["We have already rejected plaintiff Gap's contention that Executive Order No. 202.8 rendered it objectively impossible to perform its operations as a retail store where, as here, Gap filed its complaint after reopening was allowed"], *appeal dismissed* 2022 NY Slip Op 73620, 2022 WL 14996280 [Ct App, Oct. 27, 2022]; *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 537 [1st Dept 2022] ["New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic, was temporary"]).

Regarding damages, however, defendants do raise issues of fact regarding the calculation of the amounts due under both the lease and the guaranty. Several items of additional rent sought as damages are calculated by MTA's managing agent based upon MTA's estimates and are subject to reconciliation at the end of each year (Ghazelle Aff. dated August 6, 2021, NYSCEF Doc. No. 8, ¶ 10). Further, as defendants note and MTA does not dispute, the amounts estimated for dining concourse expenses and trash expenses appear not to account for the period from March 2020 through July 6, 2020, during which the dining concourse where tenant's business was located was essentially shut down (NYSCEF Doc. Nos. 14, 15).

Additionally, the third cause of action seeks liquidated damages pursuant to Section 17.4 of the lease. In relevant part, this section provides that MTA, as an alternative to seeking the remainder of the rent due under the lease after tenant vacated the premises, may seek the excess value of "(i) the present value, using a discount rate of 4% of the . . . Rent which would have been payable . . . for the remainder of the Term . . . over and above (ii) the present value, using a discount rate of 4%, of the . . . Rent that would be received by Landlord if the Premises were relet" at the time that MTA elected to seek such damages (NYSCEF Doc. No. 11, § 17.4[a]). MTA's calculation of its liquidated damages does not mention the present value of rent that would be received if MTA relet the premises at the time it elected to seek liquidated damages, nor any information as to how such present value would be calculated (NYSCEF Doc. No. 10, ¶¶ 14-16). Accordingly, while defendants do not dispute MTA's entitlement to liquidated damages on the third cause of action, an issue of fact exists as to the proper calculation of MTA's liquidated damages.

Finally, Medina asserts that, pursuant to New York City Administrative Code § 22-1005 (the "Guaranty Law"), his liability under the guaranty is limited to amounts that became due and owing to MTA prior to March 7, 2020. The Guaranty Law provides 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 June 30, 2021, inclusive.

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

The court notes that MTA initially conceded in its verified complaint that Medina was only liable for rent due through March 7, 2020 (Verified Complaint, NYSCEF Doc. No. 1 at 3 n 1). Now, however, MTA asserts that the Guaranty Law does not apply to it pursuant to Public Authorities Law § 1266(8), which provides, in relevant part, that MTA "may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and

operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries" and exempts MTA from the reach of "local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority or its subsidiaries" (Public Authorities Law § 1266[8]).

As an initial matter, MTA provides no reason why the court should countenance the seeming abandonment of MTA's voluntary acknowledgment that the Guaranty Law applied to limit Medina's liability. Even were the court to do so, Public Authorities Law § 1266(8) does not have so broad a reach as MTA suggests. The Guaranty Law does not conflict with MTA's right to recover from tenant under the lease, and the statute applies only to local laws that conflict with MTA's rights related to its real property. To hold that any law which might result in MTA being unable to obtain revenue from a given source creates a conflict, would inappropriately impact a vast swath of local laws (*Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 207 [1st Dept 2020] ["This limited statutory preemption only applies to laws that interfere with the accomplishment of the transit defendants' transportation purposes and not to preempt the application of all local laws"]). *Metropolitan Transp. Auth. v City of N.Y.* (70 AD2d 551 [1st Dept]), *lv denied* 48 NY2d 607 [1979]), cited by MTA, is not to the contrary, as that case interprets an entirely different provision of the Public Authorities Law. Accordingly, the Guaranty Law applies to limit Medina's liability to amounts accruing before March 7, 2020.

MTA also moves to dismiss defendants' six affirmative defenses for failure to state a cause of action, impossibility of purpose/frustration of purpose/*force majeure*, breach of the warranty of habitability, constructive eviction, breach of the covenant of quiet enjoyment, and

application of the Guaranty Law. Defendants fail to raise the third through fifth affirmative defenses in their opposition to the motion, rendering them subject to dismissal (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] ["By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed"]). As set forth above, plaintiff has established *prima facie* entitlement to summary judgment, and the various doctrines that would excuse defendants' performance do not apply, warranting dismissal of the first and second affirmative defenses. Finally, as the Guaranty Law does apply as set forth above, the sixth affirmative defense remains.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted as to liability against defendants JMG Restaurant Group LLC and Julian Medina on the first, second, third, and fourth causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the first, second, third, fourth, and fifth affirmative defenses are dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on January 4, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

11/22/2022
DATE

LOUIS L. NOCK, J.S.C.