SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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ESRT 501 SEVENTH AVENUE, L.L.C.,

Plaintiff,

- v -

UNIVERSAL ALLIANCE BRANDS LLC,2 DO AGAIN LLC,HUI WANG

Defendant.

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INDEX NO. 654013/2021

MOTION DATE 01/17/2023

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

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment is granted as described below.

Background

In this commercial landlord tenant case, plaintiff contends that it entered into a lease agreement with defendant Universal Alliance Brands, LLC (the "Tenant") for commercial space in a building owned by plaintiff. It alleges that defendant Wang (CEO of the Tenant) signed the agreement on behalf of the Tenant. The lease commenced on January 6, 2020 and was supposed to expire on May 31, 2025. Plaintiff also maintains that defendant 2 Do Again LLC ("2 Do") signed a corporate guaranty in connection with the lease and defendant Wang signed a good guy guarantee.

Plaintiff alleges that the Tenant failed to pay rent and it sent a default letter on December 4, 2020 observing that the Tenant owed over $150,000. It claims that the Tenant now owes $856,036.72 as of October 1, 2022.

In opposition, defendants contend that defendant Wang is not liable under an Administrative Code provision that exempted individuals from liability pursuant to guarantees where their commercial businesses were closed due to the COVID-19 pandemic. Defendants also complain that they were unable to perform due to the pandemic.

Defendant Wang submits an affidavit in which he acknowledges the Tenant did not pay the rent but claims that plaintiff was well aware of the Tenant's inability to run its business. He observes that the pandemic caused him to close the showroom and furlough all of the Tenant's employees. Wang also argues that he did not understand the importance of the two guarantees but observes that he was told the plaintiff would not lease the premises to the Tenant without them. He questions how the guarantees can be binding on him when he did not understand the contents.

In reply, plaintiff observes that defendants failed to submit a counterstatement of material facts as required under the trial court rules and that defendants did not oppose the branch of the motion that seeks a judgment against the Tenant. Plaintiff emphasizes that the impossibility defense is not a valid argument to defeat the instant motion. It maintains that the lease did not have to be notarized and that defendants do not dispute that they signed the lease or the guarantees. Plaintiff also claims that defendants did not meet their burden to show that the Administrative Code section applies to the guaranty signed by defendant Wang.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima

facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [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, 427 NYS2d 595 [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, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion and dismisses defendants' three affirmative defenses (for failure to state a cause of action, impossibility and to invalidate the guarantees) for the reasons described below. As an initial matter, the Court observes that many alleged facts[1] are not in dispute. There is no dispute that the Tenant entered into the subject lease, 2 Do and Wang entered into guarantees related to that lease and that the Tenant stopped making payments. Moreover, defendants did not offer opposition about the Tenant's liability.

Defendants' initial ground for opposition—the defense of impossibility—is completely without merit. The Appellate Division, First Department has emphasized that "we have already determined that the pandemic cannot serve to excuse a party's lease obligations on the grounds of

[1] The Court will overlook defendants' failure to upload a counterstatement of material facts.

frustration of purpose or impossibility" (*Fives 160th, LLC v Zhao*, 204 AD3d 439, 440, 164 NYS3d 427 (Mem) [1st Dept 2022]).

The second issue for this Court is whether defendant Wang can seek protection under Administrative Code § 22-1005 and reduce his liability under the guarantee he signed.

Administrative Code § 22-1005 provides that:

"Personal liability provisions in commercial leases.

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."

Clearly, paragraphs a and b do not apply to the Tenant—which produces, creates, sells, and licenses apparel according to defendant Wang's affidavit. Unfortunately, defendants failed to meet their burden to show that paragraph c applies here either. Defendant Wang contends he closed his showroom because of the financial losses caused by the pandemic (NYSCEF Doc. No. 26, ¶ 7). But nothing in the opposition papers addresses whether the business was forced to close due to Executive Order 202.7. That order closed "all barbershops, hair salons, tattoo or piercing

parlors and related personal care services" (Executive Order 202.7). That does not apply to the Tenant and this Court cannot *sua sponte* expand the reach of this code provision. Moreover, the papers submitted by defendant suggest that Wang made a business decision to furlough his employees and was not ordered to close pursuant to a specific Executive Order.

The Court also rejects defendants' contention that the lease or the guarantees should be invalidated because they were not notarized. Defendants cited no binding case law or provision in the lease (or the guarantees) that required them to be notarized in order for plaintiff to seek recovery here. Moreover, defendants do not dispute that they signed the lease or that they occupied the premises.

And, finally, the Court denies defendants' attempt to question the validity of the guarantees based on defendant Wang's inability to understand English or the guarantees themselves. The Court observes that Wang admitted he understood that plaintiff demanded that these guarantees be signed in order to complete the parties' agreement (NYSCEF Doc. No. 26, ¶ 11). That admission should have motivated defendant Wang to personally review (or discuss with someone) the obligations of the guarantees (*Chrysler Credit Corp. v Kosal*, 132 AD2d 686, 687, 518 NYS2d 162 [2d Dept 1987] [finding that a claimed lack of understanding of English did not invalidate a guarantee where the parties admitted familiarity with English and the parties did not endeavor to seek an explanation of the terms of the guarantee]).

To be clear, a lack of understanding due to a language barrier might be a reason to invalidate an agreement under the right circumstances. But that situation is not present here. The Court is presented with an agreement between highly sophisticated parties (defendant Wang contends he had a license with a famous movie star). It cannot invalidate that agreement simply because defendant Wang did not take the time to find out what he was signing. That would be

wholly unfair to plaintiff, who made it very clear to defendant Wang that it wanted these guarantees to be signed before it would agree to enter into the lease. The Court declines to absolve Wang or 2 Do of their obligations simply because defendants may now fully appreciate the implications of what they signed.

The Court observes that defendants did not sufficiently dispute the specific amount sought by plaintiff ($856,036.62 through October 1, 2022) and so the Court finds that the inquest (requested by plaintiff) shall cover only those amounts accruing after October 1, 2022. Plaintiff shall file a note of issue for an inquest regarding those damages.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, defendants' affirmative defenses are dismissed and plaintiff shall file a note of issue on or before February 21, 2023 (and the inquest shall cover those damages incurred after October 1, 2022 and the judgment shall incorporate the $856,036.62 due to plaintiff through October 1, 2022).

After filing the note of issue for an inquest, plaintiff shall contact the part clerk to schedule an inquest at SFC-Part14-Clerk@nycourts.gov.

1/23/2023
DATE

ARLENE P. BLUTH, J.S.C.

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