SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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AMCOJOR REALTY CORP.,

Plaintiff,

- v -

BUTTER MANAGEMENT LLC D/B/A BUTTER GROUP, RICHARD AKIVA,

Defendants.

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INDEX NO. 650593/2021

MOTION DATE 12/08/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to VACATE.

Upon the foregoing documents, and for the reasons stated hereinbelow, defendant's motion to vacate, pursuant to CPLR 317 and 5015(a)(1), is denied.

Background

On June 8, 2015, defendant Butter Management LLC d/b/a Butter Group ("Tenant"), as tenant, entered into a five-year commercial lease ("Lease") with plaintiff, Amcojor Realty Corp. ("Landlord"), as landlord, for a commercial space on the second and third floors of the building located at 410 West 14 Street, New York ("Premises"). NYSCEF Doc. No. 13. The Lease expired June 7, 2020. Id. The same day as the Lease was signed defendant Richard Akiva ("Guarantor") entered into a guaranty ("Guaranty") of the Lease with Landlord. NYSCEF Doc. No. 14. The Guaranty lists Guarantor's address as 453 West 17th Street, New York, and states in paragraph eight that any notice to him must be in writing and mailed to that address. Id.

The term "surrender" is not defined in the Lease, however paragraph 22 of the Lease says that upon "the expiration or other termination of the term of this lease, Tenant shall quit *and* surrender to Owner the demised premises… Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease." NYSCEF Doc. No. 13 (emphasis added). Paragraph 25 of the Lease states that "no act or thing done by Owner or Owner's agents … shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner." Id.

On January 26, 2021, Landlord commenced the instant action seeking, inter alia, back rent, use and occupancy, and additional charges from Tenant and Guarantor. NYSCEF Doc. No. 1. Service was then effectuated upon Tenant through the Secretary of State, pursuant to Limited

Liability Law § 303, and upon Guarantor, at the address listed on the Guaranty, via nail-and-mail service, pursuant to CPLR 308(4). NYSCEF Doc. Nos. 3 and 4.

In a Decision and Order dated September 23, 2021, this Court granted Landlord's motion, pursuant to CPLR 3251, for a default judgment against defendants as to liability only. NYSCEF Doc. No. 17.

On January 12, 2022, after a virtual inquest, this Court issued an Order finding that Landlord's witness, Landlord's president Dr. Richard Copell ("Copell"), testified clearly, credibly, and consistently and also finding that Tenant and Guarantor were jointly liable to Landlord in the amount of $667,599.52. NYSCEF Doc. No. 19. Landlord at the time did not credit defendants for the security deposit as they had still "not surrendered the subject premises." Id. On May 27, 2022, a judgment was filed with the New York County Clerk in the amount of $690,952.35. NYSCEF Doc. No. 22.

In May 2022, Landlord commenced a holdover proceeding against Tenant. NYSCEF Doc. No. 41. Shortly thereafter, according to Copell, Tenant acknowledged "that it was no longer in possession" of the Premises, but refused to "sign a surrender, even without prejudice." NYSCEF Doc. No. 29. In July 2022, Landlord entered the Premises to photograph it and list it for rent. NYSCEF Doc. No. 27.

On November 30, 2022, Guarantor moved to vacate the default judgment on the ground that he was not properly served and has meritorious defenses. NYSCEF Doc. No. 23.

Discussion

"A person served with a summons other than by personal delivery to him … who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment … upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." CPLR 317. Relief from a judgment or order may be granted by the court which rendered it upon the grounds of excusable default. CPLR 5015(a)(1). "A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court." 38 Holding Corp. v City of New York, 179 AD2d 486, 487 (1st Dept 1992). "Even where it is uncontroverted that defendant did not receive notice of the summons and complaint in time to defend the action … the failure to adequately demonstrate a meritorious defense will be fatal to defendant's motion to vacate." Peacock v Kalikow, 239 AD2d 188, 189 (1st Dept 1997).

Guarantor now argues: that service here was never effectuated, and therefore personal jurisdiction was never established, as the "nail and mail" service took place at a nightclub, 1Oak, managed by Tenant but was not Guarantor's "actual place of business;" that Landlord failed to perform due diligence to determine Guarantor's actual residential address or to determine that 1Oak was shuttered, and had been since New York State ordered such businesses to close at the beginning of the Covid-19 global pandemic.

Guarantor also argues that he has meritorious defenses to the complaint, namely that Tenant did not holdover in the Premises but instead "surrendered possession in September 2020." To support this, Guarantor provides a screenshot of text messages between Guarantor's sister/business partner, non-party Jacqueline Akiva ("Sister"), and Copell from October 9, 2020, in which Sister states Tenant vacated the space on September 9, 2020, and that a transfer of keys is unnecessary as the Premises are entered with a keypad, and not with keys. NYSCEF Doc. No. 26. Guarantor also alleges that the Guaranty was void pursuant to New York City Administrative Code § 22-1005 ("Guaranty Law").

In response Landlord argues that nail and mail service was proper here as: the process server had diligently made four attempts to serve at 1Oak, Guarantor's listed place of business; that even though 1Oak may have been closed to the public, it was not necessarily closed, particularly as the process server was rebuffed by a John Doe on his third attempted service and no mailings in the instant action were ever returned.

Landlord also notes that while Tenant may have "vacated" the Premises, Tenant did not also "surrender" them, as required by the Lease in its instructions to "quit *and* surrender." To that end, Landlord points to, inter alia, an email exchange between Sister and Copell dated October 29, 2020, *after* Guarantor alleges Tenant surrendered, in which Sister threatens to "revoke permission to enter" the Premises unless Landlord agreed to waive Tenant's accruing liabilities in return for taking the space back and keeping the security deposit. NYSCEF Doc. No. 38. Landlord asserts that Tenant could not revoke permission to enter a place it surrendered. Landlord notes that there is no question that there was at least some holdover, as the Lease expired on June 7, 2020, and Tenant admittedly did not even vacate until September 2020.

Finally, Landlord argues that the Premises was used as an office space, and defined as such in the Lease, and so the Guaranty Law necessarily does not apply.

Here, service was properly effectuated when Landlord's process server made four attempts to serve Guarantor at his place of business during various business hours. That 1Oak was closed to the public did not mean it was abandoned, as evidenced by the person who refused access on the process server's third attempt, as well as the fact that fact no mailings were returned.

Further, even if service upon Guarantor was ineffectual, Guarantor has failed to establish a meritorious defense. Even if Tenant *vacated* the Premises when it says it did, Landlord has submitted evidence, supported by Copell's affidavit, that Tenant repeatedly refused to *surrender* the same, despite being provided ample opportunity to do so. Although the Lease does not define the term surrender, it clearly distinguishes between quitting (vacating), which Tenant did, and surrendering, which Tenant did not.

Finally, Guarantor's attempt to take cover in the Guaranty Law is simply misguided. First, the Premises, an office space, is not the sort of space contemplated by that law, even if Tenant's other businesses were. See 450 7th Ave. Assoc. LLC v T. S. Anand & Co. CPAs, P.C. (Sup Ct, New York County 2021). Second, section 2 of the Guaranty Law only protects Guarantors of leases where the "default or other event causing such natural persons to become wholly or

partially liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive." Here, Tenant began to default on its rent obligations on June 8, 2019.

Conclusion

Thus, defendant Richard Akiva's motion to vacate the judgement against him in the amount of $690,952.35 filed on May 27, 2022, is hereby denied.

2/24/2023
DATE

ARTHUR F. ENGORON, J.S.C.

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