

**Broadway 26 Waterview LLC v Gladstein Keane & Partners PLLC**

2023 NY Slip Op 32098(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 653881/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

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INDEX NO. 653881/2021

BROADWAY 26 WATERVIEW LLC,  
Plaintiff,

MOTION SEQ. NO. 001

- v -

GLADSTEIN KEANE & PARTNERS PLLC f/k/a GLADSTEIN  
KEANE & FLOMENHAFT PLLC, and THOMAS KEANE,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-9, 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, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for

SUMMARY JUDGMENT

This is an action for unpaid rent where plaintiff seeks judgment against defendants for breach of lease and breach of guaranty. According to the June 17, 2021 complaint,<sup>1</sup> on February 24, 2014, defendant Gladstein Keane & Partners PLLC, formerly known as Gladstein Keane & Flomenhaft PLLC (“GKP”), leased the rentable portions of the twenty-sixth and twenty-seventh floors of the building located at 26 Broadway in Manhattan. Plaintiff Broadway 26 Waterview LLC is the owner of the building. Under the ten-year lease, the rent increased annually, and between August 15, 2019, and August 14, 2020, the annual rent was \$229,950.07, or \$19,162.51 per month each for the twenty-sixth and the twenty-seventh floors, along with the amounts charged as additional rent (NYSCEF Doc. No. 3, ¶¶ 40.1.1 [vi], 40.1.2 [vi]). The lease also contains provisions for late fees if the lessees pay the rent and additional rent more than five days after the due date. As is relevant here, the lease provides, at paragraph 17 (1), that upon a default by the tenants, the owner had the right to serve defendants a written fifteen-day notice of default. Upon the failure of the tenants to remedy the default, the owner had the right to serve a five-day notice of cancellation, after which defendants would have to leave the premises. Further, under paragraph 17(2) of the lease, if the tenants failed to evacuate the premises after the five-day notice, the owner had the right to enter the leased premises by force to re-take possession.

The lease also provides further financial remedies available to the owner. Paragraph 18 states that once the owner repossessed the leased premises, the tenant would be liable for the entire rent up to the time it relinquished possession. It gives the owner the option to re-let the premises in full or in part, and it states that the tenant would be liable for the rent due for the period the premises was not re-let and for any loss the owner incurred if the re-leased premises had a lower rent. If the owner did not re-let the premises, the tenant would be liable for the entire amount due under the lease. Further, paragraph 57 states, in pertinent part, that if

<sup>1</sup> The date on the complaint is June 17, 2020, but this is an error. The summons is dated June 17, 2021 (NYSCEF Doc. No. 1) and the complaint, filed on June 17, 2021, references charges that it assessed on June 8, 2021 (see NYSCEF Doc. No. 2, ¶ 25).

. . . Tenant remains in possession of the Premises after the termination of this Lease, . . . then Tenant will pay Landlord as liquidated damages for each month and for each portion of any month during which Tenant holds over . . . a sum equal to the greater of (i) one hundred fifty percent (150%) of the then fair market rental value of the Premises, or (ii) one and one-half (1.5) times the average Fixed Rental and the Additional Rental which was payable . . . during the last six (6) months of the term . . . for the first thirty (30) . . . , and . . . for each [additional] month and for each portion of any month during which Tenant holds over in the Premises . . . , the greater of (i) two hundred percent (200%) of the then fair market rental value of the Premises, or (ii) two (2) times the average Fixed Rental and the Additional Rental which was payable per month under this Lease during the last six (6) months of the term thereof (*id.*, ¶ 57).

The lease also provides for the payment of attorneys' fees and other costs the owner incurred during a successful action or proceeding against defendants (*id.*, ¶ 69.1.2).

Plaintiff also submits a copy of a personal guaranty that defendant Thomas Keane and non-party Fern Flomenhaft signed in connection with the lease (NYSCEF Doc. No. 4). In this document, the signatories unconditionally guarantee the full and prompt payment of all charges incurred under the lease. This includes reasonable attorneys' fees and any other costs the owner incurred due to the tenant's default.

The June 17, 2021, complaint asserts that GKP has not paid its full rent since April 2020, instead making "only sporadic, partial payments since then – despite Owner's repeated demands for payment" (NYSCEF Doc. No. 2, ¶ 21). On October 28, 2020, the owner e-mailed defendants a copy of a statement that included back rent and late fees (NYSCEF Doc. No. 5). On June 7, 2021, the owner sent GKP and guarantors Keane and Flomenhaft a letter stating that they owed a total of \$376,575.44, plus a late fee of \$18,828.77. The letter demanded immediate payment of the late fee (NYSCEF Doc. No. 6). The same day, another letter to the same recipients terminated the lease "effective immediately" (NYSCEF Doc. No. 7). According to the complaint, GKP refused to vacate. The complaint seeks \$392,406.82 under the lease and the guaranty, ongoing damages due to the holdover, interest, and the expenses of this litigation including attorneys' fees. Defendants' answer denies the allegations in the complaint and states several affirmative defenses, including the failure to name a necessary party, failure to mitigate, force majeure, and impossibility of performance (NYSCEF Doc. No. 12).

Currently, plaintiff moves for summary judgment under CPLR 3212 (b). Generally, the statement of material facts reiterates the allegations in the complaint (*see* NYSCEF Doc. No. 15). It notes that, in addition to the rent of \$19,162.51 per month, per floor, that the tenants owed through August 14, 2020, the lease established a monthly rent of \$19,689.48 per floor between August 15, 2020, and August 14, 2021 (*id.*, ¶ 7 [citing (NYSCEF Doc. No. 3, ¶¶ 40.1.1 [vii],

40.1.1 [vii]). Allegedly, as of June 17, 2021,<sup>2</sup> the amount due was \$512,446.14 (NYSCEF Doc. No. 15 (citing NYSCEF Doc. No. 16 [*Michael Chetrit Aff*], ¶ 3)). By the time of plaintiff's reply, defendants allegedly owed plaintiff \$906,495.84 (NYSCEF Doc. No. 41 [*Chetrit Reply Aff*], ¶ 3).

First, plaintiff argues that defendant GKP is liable under the lease. Plaintiff argues that summary judgment is proper here because the claim only involves legal issues and the undisputed facts support its application. More specifically, plaintiff asserts that it has shown the existence of a lease and the failure to pay rent due under the lease. Further, plaintiff contends that discovery is not necessary because there are no additional facts that are relevant to the issues at hand (NYSCEF Doc. No. 14, *Mem of Law in Support*), \*4, quoting *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 418 [1st Dept 2009] [as there were no material facts in plaintiff's exclusive knowledge, discovery was not necessary]). As there is no express provision in the lease to the contrary, plaintiff states, the tenant's obligations under the lease cannot be relieved based on any landlord breach that defendants might allege (NYSCEF Doc. No. 14, \*5, quoting *Harlington Realty Co. LLC v Lawrence Plumbing Supply Inc.*, 2020 NY Slip Op 32671 [U], \*7 [Sup Ct, NY County 2020], *affd* 201 AD3d 435 [1st Dept 2022]). According to plaintiff, GKP also cannot point to the pandemic as a reason to relieve the tenants of their liability (NYSCEF Doc. No. 14, \*\*5-6, citing *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021] [*170 Broadway*] [finding that pandemic did not fall within a provision that provided for rent abatement due to a casualty, as that provision "refer[red] to singular incidents causing physical damage to the premises"]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 561-562 [1st Dept 2021] [concluding that frustration of purpose was inapplicable where, during the period of nonpayment, tenant initially reopened for curbside service and subsequently gained access to the premises in question]).

Defendant GKP opposes the motion. Through the affidavit of Thomas F. Keane, the guarantor-defendant and a partner in GKP (NYSCEF Doc. No. 23), defendant states that although Gladstein Keane and Flomenhaft PLLC leased the office space in question, the firm split on June 30, 2015, dividing into GKP and Flomenhaft PLLC. After this point, GKP occupied the 27th floor and Flomenhaft PLLC occupied the 26th floor. Keane states that plaintiff was aware of this split and treated the two firms as separate entities on separate floors, and that plaintiff has accepted separate rent checks, responded to Flomenhaft PLLC's requests for repairs, and, on information and belief, has negotiated with Flomenhaft PLLC for a rent reduction. GKP states that discovery is necessary to ascertain whether there was an agreement between Flomenhaft PLLC and plaintiff and to determine what payments Flomenhaft PLLC has made with respect to the 26th floor.

In addition, defendants challenge the accuracy of the statement of arrears contained in the Chetrit affidavit. Defendants assert that they paid plaintiff \$10,000.00 on February 18, 2021, and that they also paid a security deposit of \$159,366.83 on that date. Allegedly, the check was cashed and plaintiff has not returned or credited defendants for the \$159,366.83 that Keane provided. Defendants do not submit documentary evidence supporting these contentions. However, they note that the only evidence of the amount due is plaintiff's own arrears statement,

<sup>2</sup> This document is dated June 17, 2020, but it should be dated June 17, 2021 (*see n1*).

which lists a balance due of \$392,406.82 (NYSCEF Doc. No. 8), and Chetrit's affidavit stating, without evidentiary support, that the amount due has increased to \$512,446.14. For this reason, they allege that, at a minimum, an inquest is necessary (NYSCEF Doc. No. 30, citing *LMezz 250 W90 LLC v Ringel*, 2018 NY Slip Op 30471 [U], \*24 [Sup Ct, NY County 2016]).

Defendants also allege that they were legally prohibited from using the offices on the twenty-seventh floor starting on March 20, 2020, at 8:00 P.M., pursuant to various executive orders issued by then-Governor Mario Cuomo (*see* NYSCEF Doc. Nos. 26-29). They state that this restriction significantly hindered their ability to conduct business. Even once they regained access to the floor, Keane contends, only "three of the eight" people who comprise GKP have used the premises, no more than one per day (NYSCEF Doc. No. 23, ¶ 17). Keane estimates that he has worked in the office around twenty-five times. Further, the firm generally sublets offices, but due to the pandemic they had five unrented offices on the twenty-seventh floor "with no prospects for renting them" (*id.*, ¶ 14).

Defendants contend that the pandemic-related government orders constitute a "casualty" within the meaning of section nine of the lease agreement and therefore the rent should be partially or fully excused for the pandemic period (*id.*, ¶ 20). The lease provides that if there is a partial casualty, "the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty" (*id.*). If the premises is "wholly unusable . . . , then the rent and other items of additional rent . . . shall be proportionately paid up to the time of the casualty, and thenceforth shall cease until the date when the demised premises shall have been repaired . . . (of if sooner reoccupied in part by the Tenant[,] then rent shall be apportioned as provided [for a partial casualty]...) (*id.*). They cite *188 Ave. A Take Out Food Corp. v Lucky Jab Realty Corp.* (2020 NY Slip Op 34311 [U], \*\*6 [Sup Ct, NY County 2020] [*188 Ave. A*]), and *JN Contemporary Art LLC v Phillips Auctioneers LLC* (507 F Supp 3d 490, 501-502 [SD NY 2020], *aff'd* 29 F4th 188 [2d Cir 2022]) for the respective propositions that section nine of the lease applies and that the pandemic qualifies as a national disaster. In addition, they state that the impact of the pandemic and the orders have made it impossible for them to pay the full rent. For this reason, they state that they are entitled to an elimination or, alternatively, a reduction of their rental obligations "for, at a minimum, portions of ongoing the [*sic*] COVID-19 pandemic" (NYSCEF Doc. No. 23, ¶ 21).

In addition, defendants argue that the doctrine of frustration of purpose applies as a defense to their non-payment. Here, they state, the pandemic frustrated the lease's primary purposes of using and renting the space in question. They argue that these purposes were "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (NYSCEF Doc. No. 30, quoting *Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 85 [1st Dept 2016]). According to defendants, as the lease expressly states that the premises was to be used for offices, there is an issue of fact as to the applicability of this principle. In support, defendants cite *International Plaza Assoc. L.P. v Amorepacific US, Inc.* (2020 NY Slip Op 34521 [U] [Sup Ct, NY County 2020]), in which the trial court found an issue of fact regarding whether COVID-19 could be used in a frustration of purpose defense and, accordingly, denied the landlord's motion for summary judgment. Defendants also refers to *Hwa 1290 III LC v GKNY Inc.* (2021 NY Slip Op 31621 [U] [Sup Ct, NY County 2021]), and *1877 Wester Ave. v Tremont Ctr.* (72 Misc 3d 284 [Sup Ct, Bronx County 2021]), in which the

trial courts found issues of fact as to whether frustration of purpose and impossibility applied where a restaurant and a nightclub, respectively, were forced to close due to COVID-19 (NYSCEF Doc. No. 30, \*14 [also quoting *267 Dev. LLC v Brooklyn Babies & Toddlers, LLC* (2021 NY Slip Op 30796 [U] [Sup Ct, Kings County 2021] [267 Dev.] [on issue of impossibility], *vacated on other grounds* 2022 WL 3105985 [Sup Ct, Kings County 2022])).

The court grants this prong of plaintiff's motion for summary judgment as to liability but determines that a hearing is required on the issue of damages. The court does not question defendants' statement that the law firm's business and its ability to rent its excess office space were negatively impacted by the pandemic. However, as plaintiff notes in its moving papers and its reply, the First Department has rejected the efforts of tenants to rely on arguments such as those defendants raise here (*see 88 Greenwich Owner LLC v 21 Rector St. LLC*, \_\_\_ AD3d \_\_\_, \_\_\_, 2023 NY Slip Op 02960 [1st Dept 2023]; *Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 439-440 [1st Dept 2022]). As the First Department recently noted, it has rejected the "invocation of the pandemic as grounds for application of the doctrines of frustration of purpose or impossibility . . . even, at times, where the business of the party seeking application of such doctrines was temporarily suspended" (*Pentagon Federal Credit Union v Popovic*, \_\_\_ AD3d \_\_\_, \_\_\_, 2023 NY Slip Op 03076, \*1 [1st Dept 2023]).

More specifically, the First Department has made it clear that commercial tenants cannot argue that the COVID-19 pandemic excuses their obligations based on either frustration of purpose or impossibility. The doctrine of frustration of purpose does not apply because the tenant was not "'completely deprived' from using the premises as intended under their lease agreement" (*Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022], quoting *170 Broadway*, 195 AD3d at 577). Similarly, the First Department has rejected the doctrine of impossibility, finding that "the pandemic, while continuing to be disruptive for many businesses, did not render [the tenant's] performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed" (*Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022] [internal quotation marks and citation omitted]).

The above principles clearly apply where, as here, the commercial lease involves office space. In *373-381 PAS Assoc., LLC v Ideko Prods., LLC*, 214 AD3d 401 [1st Dept 2023]), for example, the First Department found that a live events coordinator was liable for the rent due for its general, executive, and administrative office space. The court concluded that the tenant's lease space was not affected by the pandemic because, "[w]hile defendant's business was as a large-scale live events coordinator, no such events occurred in the leased commercial space" (*id.* at 401). The court reached this conclusion although the defendant "may have lost all or nearly all of its business during the early months of the pandemic [because] it was not required to cease operation" under any existing order (*id.* at 402 [internal quotation marks and citation omitted]). The trial court orders upon which defendants rely for the contrary proposition predate the First Department decisions above, and it is the appellate cases that bind this court. Moreover, *188 Ave. A* is distinguishable in that it involved an indoor dining restaurant and, as such, its operations were suspended entirely for the duration of Executive Order 202.3.

With one exception, the Executive Orders upon which defendants rely do not support their argument. Executive Order 202.6 states that “[a]ll businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 P.M.” (NYSCEF Doc. No. 27, \*2). This does not mandate closure of the leased space, and it allows for the businesses to continue, where possible, through remote work. There is no indication that the firm’s employees could not do so. Also, it appears that GKP’s employees and partners were able to work in the leased space. Indeed, defendants concede that some of their employees worked at the offices, albeit for brief periods, during the pandemic (NYSCEF Doc. No. 23, ¶ 17). Subsequent orders also included the rule set forth in Executive Order 202.6 (*see* NYSCEF Doc. Nos. 28, 29). The most recent executive order that defendants submit, Executive Order 202.8, however, stated that between March 23, 2020,<sup>3</sup> and April 19, 2020, non-essential businesses had to reduce their in-person workforces “by 100%” (NYSCEF Doc. No. 29, \*2). Even this order did not necessitate the closure of the entire business.

Moreover, GKP cannot rely on the principle of force majeure. Although force majeure is referenced in the lease, the pertinent provision – the only provision to which defendants point – states, in its entirety, that, “[s]ubject to applicable law and force majeure, Landlord shall provide Tenant with access to the demised premises 24 hours a day, seven days a week, 365(6) days a year” (NYSCEF Doc. No. 3, ¶ 66.5). This clause does not excuse GKP’s responsibility to render payment, and the court “may not add or imply” a relevant clause (*Fives 160th*, 204 AD3d at 440). Defendants’ position that it may be entitled to a partial rent abatement also lacks merit, as the pandemic is not considered a casualty (*see 170 Broadway*, 195 AD3d at 577).

Although liability is clear, the amount that GKP owes is not. While some of defendants’ arguments lack merit,<sup>4</sup> defendants also have raised legitimate concerns as to the amount alleged due. Plaintiff submits a printed page listing payments that Flomenhaft and Keane allegedly made under the lease. However, the printout, which is simply a list of alleged payments under each party’s last name, is not adequate; indeed, the paper misspells Keane as “Kean” (NYSCEF Doc. No. 44). Further, the amounts listed on the document do not appear to be noted on the billing statement that alleges there is a \$906,495.84 balance (*see* NYSCEF Doc. No. 43). Also, plaintiff argues that defendants are liable for the entire leased premises, which includes the twenty-sixth floor, but the billing statement indicates that it is for “26 Broadway – 27th Floor” (*id.*). It is not clear whether the statement also includes the amount due for the 28th floor. There also is no explanation for the comment that a \$50,000.00 credit should be applied to the bill (*id.*, \*5). That amount is not listed as a payment. There is no explanation of certain codes, such as “RET” and “SUBMTR,” and no calculation establishing the late charges and holdover fees, and no explanation as to which rents and holdover fees apply to which floors. In addition, if plaintiff has assessed charges for both floors, then Flomenhaft’s payments and any reduced rental

<sup>3</sup> The closure commenced the evening of March 22, 2020 (*see* NYSCEF Doc. No. 29, \*2).

<sup>4</sup> As plaintiff points out, section 56.1 of the lease states that plaintiff “may (*but shall not be required to*) use, apply or retain the whole or any part of the security . . . for the payment of any past-due [rent]” (emphasis supplied). The section also provides that if plaintiff applies the deposit, the tenant must “promptly deposit with Landlord an amount sufficient to restore such security” (*id.*).

arrangement are relevant to the overall billing. Because of these deficiencies, a hearing on this issue is warranted.

Similarly, plaintiff argues that summary judgment should be granted against Keane based on his status as a guarantor. They note that they have established a *prima facie* case by showing “the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty” (NYSCEF Doc. No. 14, \*6-7, quoting *Kato Intl. LLC v Gerard Fox Law, P.C.*, 2020 NY Slip Op 31673 [U], \*6 [Sup Ct, NY County 2020] [internal quotation marks and citation omitted]). Plaintiff stresses that the guaranty was unconditional and that Keane has not satisfied his obligation as guarantor. Finally, they state that attorneys’ fees and other litigation costs are due under the lease, as well.

In opposition to this branch of the motion, defendants argue that New York City Administrative Code § 22-1005 (Administrative Code § 22-1005) bars enforcement of the guaranty. As is relevant here, this law protects guarantors if, during the pandemic, the tenant “was a non-essential retail establishment subject to in-person limitations . . . .” (*id.*, § 22-1005 [1] [b]). Defendants argue that GKP qualifies as a retail establishment under this provision. They cite *267 Dev.* in support of their position (*see* NYSCEF Doc. No. 30, \*19). Alternatively, they contend that summary judgment should be denied because issues of fact exist as to whether the force majeure doctrine in section 66.5 of the lease applies (*id.*, citing NYSCEF Doc. No. 3, ¶ 66.5). Regardless, defendants argue that COVID-19 restrictions rendered delivery of the premises impossible.

Additionally, Keane notes that both he and Flomenhaft guaranteed the lease (*id.*, ¶ 4 [citing NYSCEF Doc. No. 4]). He points out that plaintiff has not sued Flomenhaft in her capacity as guarantor and has sought to collect from him alone. Defendants speculates that in this action, plaintiff may be seeking to obtain the deficiency between Flomenhaft PLLC’s reduced rent and the lease rent. Defendants allege that they intend to add Flomenhaft as a third-party defendant. They also state that they will pursue discovery from her to determine whether she made any payments to plaintiff that should be credited to the account.<sup>5</sup>

For the same reasons the court finds that GKP is liable under the lease, Keane’s challenges based on impossibility, frustration of purpose, and force majeure do not insulate him from liability as the guarantor. In addition, as plaintiff argues, New York City Administrative Code § 22-1005 is inapplicable because GKP is not a non-essential retail establishment (*40 X Owner LLC v Masi*, 2021 NY Slip Op 30041 [U], \*2 [Sup Ct, NY County 2021]). A critical element of the provision is that the business in question had to cease operation or close to the public (*see 274 Madison Co. v Vieira*, 205 AD3d 403, 404 [1st Dept 2022] [finding that code applied to language school that was forced to close]). Therefore, defendants’ reliance on *267 Dev.* – which, moreover, is contrary to controlling First Department precedent – is misplaced. The court also notes that paragraph 76 of the lease, entitled “USE OF PREMISES,” states that “[u]nder no circumstances whatsoever shall the Premises or any part thereof be used: . . . (13) for retail, manufacturing or residential use” (NYSCEF Doc. No. 3). This further undermines defendants’ argument that it qualifies as a non-essential retail establishment (*see 18 E. 41st St.*

<sup>5</sup> The court notes that defendants made this statement on November 5, 2021. However, there is no record of a third-party action in the NYSCEF filing system for this case.

*Partners LLC v Gamlieli*, 2022 NY Slip Op 32471 [U], \*3 [Sup Ct, NY County 2022]). Moreover, Keane’s assertion that it was impossible to deliver the premises to the owner during COVID lacks merit. As plaintiff states, Keane provides no reason that defendants could not return the office keys to plaintiff and arrange for pickup and storage of any furniture and other materials in the rented space.

Further, the court concludes that Flomenhaft is not a necessary party to the action.<sup>6</sup> Under the guaranty, “[i]f at any time the term ‘Guarantor’ shall include more than one (1) person or entity, the obligations of all such persons and/or entities under this Guaranty shall be joint and several” (NYSCEF Doc. No. 50, \*1). It cites *Dominion Capital LLC v Philippe Equities LLC* (2018 NY Slip Op 32478 [U], \*11 [Sup Ct, NY County 2018]) for the proposition that if “all of the guarantors . . . are jointly and severally liable, it cannot be argued that [one guarantor] was indispensable to the suit” (quoting *Newman-Green, Inc. v Alfonzo-Larrain*, 490 US 826, 838 [1989] [brackets and ellipses in *Dominion*]). Defendants have not presented any evidence or caselaw to the contrary. This does not vitiate Keane’s ability to pursue any rights he may have against Flomenhaft.

For the same reasons as above, however, there must be a hearing as to the amount of Keane’s liability as guarantor (*see also W Assoc., LLC v Lee*, 75 Misc 3d 1236 [A], 2022 NY Slip Op 50747 [U], \*\*1-2 [Sup Ct, NY County 2022] [with few exceptions, guarantor’s liability cannot exceed that of the primary obligor]). Attorney’s fees also are appropriate (*see* NYSCEF Doc. No. 3, ¶ 81.10). For the reasons above, therefore, it is

**ORDERED** that plaintiff’s motion is granted on the issue of defendants’ liability; and it is further

**ORDERED** that a hearing is directed on the issue of damages and attorney’s fees, and the matter is referred to a Special Referee to hear and report; and it is further

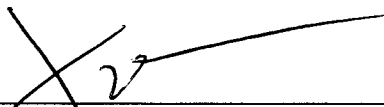
**ORDERED** that counsel for the plaintiff shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date.

This constitutes the decision and order of this court.

**June 16, 2023**

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CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<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 checked="" type="checkbox"/>
			<input type="checkbox"/>	DENIED	<input type="checkbox"/>
				OTHER	

  
 \_\_\_\_\_  
 HON. VERNA L. SAUNDERS, JSC

<sup>6</sup> Although defendants refer to her as such, they do not move for affirmative relief. However, plaintiff challenges defendants’ statement. Therefore, the court addresses it briefly.