

Glenhill Assoc., LLC v JPO Concepts, Inc.

2023 NY Slip Op 32408(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 161048/2021

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

-----X

INDEX NO. 161048/2021

GLENHILL ASSOCIATES, LLC,
Plaintiff,

MOTION SEQ. NO. 001

- v -

**DECISION + ORDER ON
MOTION**

JPO CONCEPTS, INC. and HELAH KEHATI,
Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for

SUMMARY JUDGMENT

In December 2021, Glenhill Associates, LLC (hereinafter “landlord” or “plaintiff”) commenced this action seeking past due rent and additional rent due under a commercial lease, enforcement of a guaranty agreement, and legal fees and disbursements in connection with this proceeding (NYSCEF Doc. No. 12, *summons and complaint*). In January 2022, defendants each filed a notice of appearance and answer (NYSCEF Doc. Nos. 16 and 17).

The answer of defendant JPO Concepts, Inc. (hereinafter “tenant” or “defendant”) sets forth a general denial and fifteen affirmative defenses (NYSCEF Doc. No. 16). They are: (1) failure to properly serve defendant; (2) failure to credit tenant for abatements and some payments; (3) fundamental unfairness;¹ (4) accord and satisfaction; (5) unjust enrichment; (6) payment of all lawful amounts owed plaintiff; (7) failure to state a cause of action; (8) failure to mitigate damages; (9) impossibility, commercial impracticability, illegality and/or frustration of the lease’s purpose; (10) deprivation of intended use of premises – specifically, that “[d]ue to unforeseeable events related to the COVID-19 pandemic, all...outside of Defendant’s control, Defendant was deprived of the intended use and such use *became* {sic}”(*id.* at ¶ 79);² (11) frustration of purpose; (12) failure of consideration; (13) impossibility; (14) prohibited use under the law; (14) commercial impracticability;³ and (15) failure to show damages. As part of the fifteenth affirmative defense, defendant also asserts entitlement to a money judgement for legal fees, costs, and disbursements resulting from this litigation.

¹ The second sentence in the third affirmative defense contains an obvious typographical error. It reads in part: “*Plaintiff* was unable to operate its business in a profitable manner since March 2020” (*id.* at 58) (emphasis added). Clearly “defendant” was the correct word, not “plaintiff.”

² As the above quote indicates, critical words are missing from this paragraph and cause of action.

³ Defendant erroneously numbered the affirmative defenses such that there are two separate fourteenth affirmative defenses. The second affirmative defense should have been labeled fifteenth affirmative defense.

The answer of defendant Helah Kehati, President and Owner of JPO Concepts, Inc. (hereinafter “guarantor,” “Kehati,” or “defendant”), is identical to tenant’s answer except for minor alterations of a few sentences, differences in the introduction to the affirmative defense section, and a sixteenth affirmative defense (NYSCEF Doc. No. 17). It asserts tenant was “subject to” Governor Cuomo’s Executive Orders Numbers 202.3, 202.6, and 202.7, tenant defaulted on required lease payments, and guarantor’s alleged personal liability for tenant’s defaults is unenforceable due to Administrative Code of the City of New York § 22-1005 (*id.* at ¶¶ 93-96).

In February 2022, plaintiff filed the current motion for summary judgment against tenant under the lease and against guarantor under the guaranty agreement (NYSCEF Doc. No. 8, *notice of motion*). The motion seeks a money judgment for \$195,903.08 in unpaid rent and additional rent, plus damages which continue to accrue, or in alternative, an inquest for damages.

Defendants oppose the motion and cross-move for summary judgment, based upon the doctrine of impossibility (NYSCEF Doc No. 24, *notice of cross-motion*). Additionally, guarantor seeks summary judgment, claiming Administrative Code § 22-1005 shields her from liability. Both the motion and cross-motion seek legal fees and expenses incurred in this action and ask the court to direct an inquest to determine the amount of the award. Alternatively, plaintiff asks the court to accept affidavits as to the amount. Plaintiff’s motion is granted in part and denied in part. Defendants’ cross-motion is denied.

The relevant background follows. On June 11, 2015, plaintiff and tenant entered into a lease (“original lease”) for suite 1805 at 307 West 38th Street, New York, New York 10018 for a term through May 31, 2023 (NYSCEF Doc No. 18, *lease*). The permitted use clause states, in relevant part:

“Tenant shall use and occupy the Premises...for food preparation for catering services, photography studio, uses ancillary to a photography studio and general and executive offices and for no other purpose whatsoever. Tenant's occupancy and use of the Premises shall include (a) a minimal food preparation for catering services, (b) providing facilities for food preparation, photographing and other materials for Tenant's customers, guests, clients, invitees and employees (which shall include equipment, props, food and other materials Tenant or its clients may bring with or have delivered to the Premises) together with Tenant's services and equipment (including a functioning kitchen facility, photographic lights props and other equipment), and (c) casting, staging, meetings and event facilities in connection with Tenant's business activities....Landlord hereby acknowledges that Tenant shall use the Premises as and for video and photographic production of food related media content, including, cooking, casting, staging, meetings and event facilities in connection with Tenant's business activities, and as provided in paragraph 71 of this Lease” (*id.* at *2).

Paragraph 71 requires that when tenant holds events, it must obtain landlord's prior written approval for certain events and comply with all laws (*id.* at *30). The section also states failure to follow its terms "shall be deemed a material default."

Kehati signed a guaranty agreement on the same date the lease was signed (NYSCEF Doc. Nos. 18-19, *lease and guaranty*). The agreement explicitly sets forth an irrevocable and unconditional guaranty of Kehati's financial obligations to landlord. Both the lease and guaranty contain provisions related to defendants' obligation to pay plaintiff's reasonable attorney fees should plaintiff prevail in litigation regarding defendants' default in payment under these contracts.

The litigants agree the lease was subsequently amended by four letter agreements dated April 9, 2020, June 25, 2020, August 4, 2020, and December 9, 2020 (NYSCEF Doc. Nos. 11, *Kim aff. [landlord's agent] and 25, Kehati aff.*)⁴ The June agreement provided a complete base rent abatement for June 2020, reiterated tenant remained liable for the monthly additional rent, and changed the lease expiration date to August 31, 2023 (NYSCEF Doc No. 35, *June agreement*). Then, the August 2020 agreement granted a full base rent abatement for July 2020 through October 2020, reiterated tenant's liability for the additional rent, and extended the lease expiration date to December 31, 2023 (NYSCEF Doc. No. 18, *lease *51 August agreement*). The December 2020 agreement provided a complete base rent abatement for November 2020 through April 2021, granted a fifty percent base rent abatement for May 2021 through August 2021, required tenant to pay the monthly additional rent, and extended the lease expiration date to August 31, 2024 (NYSCEF Doc. No. 37, *December agreement*). In the December agreement, tenant acknowledged owing \$66,467.14 in arrears through December 9, 2020, reduced by abatement to \$30,645.58. The parties agreed to a sixteen-month payment plan for the arrears. In each agreement, there is a statement signed by guarantor that the guaranty dated June 11, 2015 remains in full force and effect.

In support of the instant motion, plaintiff submits, *inter alia*, the pleadings, the lease and subsequent letter amendments, the guaranty agreement, the rent ledger, the relevant executive orders, an affidavit from Sekyung Kim, landlord's managing agent, and an attorney affirmation and memorandum of law (NYSCEF Doc. Nos. 8-23). In the affidavit, Kim alleges landlord fully performed its lease and guaranty obligations (NYSCEF Doc. No. 11). Kim further alleges defendants failed to pay part of the rent and additional rent due for November 2019 through February 2022 in the aggregate sum of \$195,903.08. With respect to how the arrears were calculated, Kim explains that during its regular course of business, plaintiff uses computer software where each charge to tenant was inputted and given an invoice number, payments were applied to their corresponding invoice number and the software reflects the arrears to date for each open invoice entry.

Kim represents that Exhibit I is an open invoices statement (hereinafter "statement" or "rent ledger") generated by plaintiff's software regarding tenant's account reflecting all

⁴ Plaintiff refers to the original lease and letter amendments collectively as the lease and states a true copy of the lease is annexed as Exhibit G; defendant refers to Exhibit E as the April agreement (NYSCEF Doc. Nos. 11, *Kim aff and 25, Kehati aff*). Neither exhibit includes the April agreement (*see* NYSCEF Doc. Nos. 18, *exhibit G, copy of the lease and 33, exhibit E, unsigned copy of the December agreement*).

outstanding arrears.⁵ The affidavit states the original lease set the monthly base rent at \$17,910.78 between June 2020 and May 2021 and \$18,448.11 between June 2021 and May 2022, and the December 2020 agreement provided a fifty percent base rent abatement for May 2021 through August 2021. Kim avers the base rent arrears are \$147,316.20 for May 2021 through February 2022. Kim references the relevant paragraphs of the original lease for each category of tenant's additional rent obligation. She claims that, based on the statement, the late fee arrears are \$9,990.57, the real estate tax arrears for July 2021 through January 2022 are \$16,340.66, the electric arrears for November 2019 through February 2022 are \$19,905.65, the extermination arrears for May 2021 through February 2022 are \$350.00, and the sprinkler and water bill arrears for May 2021 through February 2022 are \$1,000.00 each.

Plaintiff's attorney argues summary judgment is appropriate because plaintiff proved an underlying debt is due under the lease and the affirmative defenses are conclusory, unsubstantiated, and inapplicable to the circumstances at issue here (NYSCEF Doc. Nos. 10, *counsel's affirmation* and 22, *mem of law*). Counsel believes the second affirmative defense is refuted by Kim's affidavit and the rent ledger, which shows plaintiff reduced the rents accordingly. Counsel notes the First Department has rejected the affirmative defenses of impossibility and frustration of purpose in the COVID-19 context. Counsel contends summary judgment should be granted against guarantor because the guaranty agreement contains an absolute and unconditional promise of payment. Further, counsel emphasizes that many of the defenses raised by guarantor inure to tenant and therefore, guarantor cannot assert them. Plaintiff rejects guarantor's position that she is absolved from liability pursuant to Administrative Code § 22-1005, arguing that tenant's business was not the type of business subject to Executive Orders Numbers 202.3, 202.6, and/or 202.7.

In opposition and in support of their cross-motion for summary judgment, defendants submit, *inter alia*, the lease and subsequent letter amendments, a document labeled the August 18, 2021 agreement along with e-mails discussing the document, the guaranty agreement, the relevant executive orders, an affidavit from Kehati, and an attorney affirmation and memorandum of law (NYSCEF Doc. Nos. 24-44). A primary focus of defendants' opposition and cross-motion is the nature of tenant's business and executive orders issued during the pandemic (NYSCEF Doc. Nos. 25, *Kehati aff*, 27, *mem of law*, and 28, *counsel's affirmation*). Defendants allege that tenant's business "was primarily a food event business" within the meaning of Executive Order 202.3 and that "[a]t various times JPO would host events involving the preparation and serving of food, as well as the staging and photography of food and food consumption" (NYSCEF Doc. Nos. 25, *Kehati aff at ¶ 4 and ¶ 6* and 44, *counsel's affirmation at ¶ 32*). Kehati concedes the suite contains office space, though she represents she would not have rented the premises solely for office space. Indeed, defendants maintain such "space is incidental to the business of food preparation, display, consumption and photography" (NYSCEF Doc. No. 25, *Kehati aff at ¶ 4*). Kehati affirms she stopped operating the business because of Executive Order 202.3, and she claims this action was made "on the good faith belief that JPO was no longer permitted to serve food or beverages under this order" and she "was not in a position to parse the language and challenge whether...[it] would be construed as a restaurant or

⁵ Kim incorrectly claims Exhibit H lists six categories of balances owed, but Exhibit H is the guaranty agreement (NYSCEF Doc. Nos. 11, *Kim aff* and 19, *guaranty*). Presumably Kim was referring to Exhibit I, which has a column labeled "Cat" containing seven abbreviations (NYSCEF Doc. No. 20).

not” (*id.* at ¶ 6). Defendants next argue cessation of operations was necessary because the lease required tenant to comply with all laws, and the failure to follow any executive order would have constituted a default. In a similar fashion, three March 2020 Executive Orders 202.6, 202.7, and 202.8, required all non-essential businesses to reduce their in-person workforce by fifty percent, seventy-five percent and then one hundred percent respectively, and tenant informed plaintiff it ceased operations in accordance with the Governor’s orders. Defendants allege the business could not operate remotely or with only a fourth of the employees in the premises. Therefore, tenant claims it was impossible to perform its business as intended and thus, tenant should be excused from making payments under the lease. Defendant further argues the doctrine of impossibility discharges guarantor’s liability pursuant to Administrative Code § 22-1005, and plaintiff’s reliance on decisions such as *558 Seventh Ave. Corp. v Times Sq. Photo Inc.* (194 AD3d 561 [1st Dept 2021] [*558 Seventh Ave. Corp.*]) and *Gap, Inc. v 170 Broadway Retail Owner, LLC* (195 AD3d 575 [1st Dept 2021] [*170 Broadway Retail Owner*]) is misplaced.

Defendants claim there was a fifth letter agreement dated August 18, 2021 which reduced the base rent to \$3,000.00 per month through October 2021 and extended the lease to October 31, 2024 (*see* NYSCEF Doc No. 38, *unsigned August 2021 amendment*). In this alleged agreement, tenant acknowledged owing \$59,766.74 in arrears through August 6, 2021.

Defendants dispute plaintiff’s contention that the Kim affidavit and rent ledger defeat their second affirmative defense, arguing the statement includes sums they do not owe. Defendants allege landlord’s payment portal did not show the agreed upon abatements, and these errors are reproduced in the rent ledger. Defendants further allege the items on the portal were not clearly categorized and therefore it is unclear “which additional rent charges were being assessed by which invoice items” and “which additional charges have been paid” (NYSCEF Doc. No. 25, *Kehati aff at* ¶ 22). Counsel claims the billing rates in the rent ledger for May, June, and July of 2021 do not account for the December 2020 abatement agreement. Counsel also faults landlord for the failure to annex any corroborating bills for the additional rent items shown on the rent ledger.

Defendants admit plaintiff fulfilled its contractual obligations. They also waive their first, fourth, fifth, sixth, and seventh affirmative defenses and seek dismissal of the complaint. Alternatively, should the court determine that defendants are not entitled to such relief, they assert their remaining defenses raise issues of fact necessitating a trial. They also suggest the court should permit discovery.

In her opposition to the cross-motion and her reply, plaintiff submits, *inter alia*, a second affirmation from counsel and a second affidavit from Sekyung Kim (NYSCEF Doc. Nos. 45-47). The affirmation counters defendants’ interpretation of case law on impossibility and challenges defendants’ arguments involving the Executive Orders and Administrative Code § 22-1005. Counsel also addresses defendants’ arguments challenging the accuracy of the rent ledger. For instance, counsel notes that while the months of May, June, and July of 2021 each show a charge for the full base rent, the rent ledger also shows corresponding credits for the fifty percent abatement. Moreover, counsel and Kim highlight that the purported August 2021 abatement agreement, submitted as an exhibit by defendants, bears no signatures. Kim further avers “the office of Plaintiff’s managing agent does not have any executed agreement with the Defendants

after the agreement dated December 9, 2020” (NYSCEF Doc. No. 47, *reply aff at* ¶ 5). Plaintiff seeks summary judgment in its entirety, but alternatively asks that, if the court finds the rent ledger inaccurate, then the court grant partial summary judgment for a breach of defendants’ duty to pay plaintiff under the lease and guaranty.

“Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], [internal quotation marks and citation omitted]; *see* CPLR § 3212 [b]). The movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see* CPLR § 3212 [b]). Should the movant satisfy this evidentiary burden, the party opposing summary judgment can defeat the motion by “show[ing] facts sufficient to require a trial of any issue of fact” (CPLR § 3212[b]). However, the court will grant summary judgment “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (*id.*).

For breach of contract claims, a plaintiff meets its *prima facie* evidentiary burden by proving “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019] [internal quotation marks and citation omitted]). More specifically, a landlord seeking summary judgment against a tenant for breach of rental obligations satisfies its *prima facie* evidentiary burden by proving the existence of a lease, landlord’s performance under the lease, tenant’s nonpayment of rent, the total debt due, and a description of the how the amounts due were calculated (*see Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). A landlord seeking summary judgment against a guarantor satisfies its *prima facie* evidentiary burden by proving the existence of a guaranty agreement with an absolute and unconditional guaranty, a debt owed by tenant to landlord, and guarantor’s failure to pay under the agreement (*see L. Raphael NYC C1 Corp. v Solow Bldg. Co., L.L.C.*, 206 AD3d 590, 592-593 [1st Dept 2022]).

Plaintiff met its *prima facie* evidentiary burden against defendants. There is no dispute concerning the existence of a lease or guaranty agreement or plaintiff’s performance. The rent ledger, along with the explanations contained in the first Kim affidavit, established defendants’ nonpayment. Plaintiff further established that the debt remains unpaid.

The court next turns to the affirmative defense of impossibility. It requires a tenant to show “destruction of the subject matter of the contract or the means of performance makes performance objectively impossible” (*e.g. Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). However, the First Department has repeatedly ruled that the COVID-19 “pandemic does not provide a basis to excuse a party’s lease obligations on the grounds of impossibility” (*Triad 11 E, LLC v Midoriya, Inc.*, 216 AD3d 540, 541 [1st Dept 2023] citing *Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 439-440 [1st Dept 2022]; *558 Seventh Ave. Corp.*, 194 AD3d at 561-562, *appeal dismissed* 37 NY3d 1040 [2021]). Indeed, the Department has explicitly declared that the “invocation of the pandemic as grounds for application of the doctrines of frustration of purpose or impossibility is an approach this Court has squarely rejected -- even, at

times, where the business of the party seeking application of such doctrines was temporarily suspended” (*Pentagon Fed. Credit Union v Popovic*, —AD3d—, 2023 NY Slip Op 03076, *1 [1st Dept 2023]).

Defendant’s attorney represents that *558 Seventh Ave. Corp.* (194 AD3d at 561-562), cited by plaintiff, is distinguishable because tenant’s sales and repair store was located on the building’s first floor and tenant used the premises to provide curbside service for part of the pandemic. In contrast, counsel asserts the instant business cannot function on a sidewalk; it is located on the building’s eighteenth floor, and it engages in food preparation, food photography and food events. Counsel further argues there was no legal way for tenant to operate from the premises without violating an executive order, which itself would constitute a violation of the lease.

Counsel’s arguments are unpersuasive. There is no allegation that the premises were destroyed or that tenant was permanently prohibited from accessing the space. This tenancy involves a long-term lease and though tenant’s revenue may have been nonexistent during the pandemic, tenant could use the premises when the applicable executive order expired (*see generally 450 7th Ave. Assoc. LLC v T. S. Anand & Co. CPA’s, P.C.*, 2022 NY Slip Op 31072[U], *4 [Sup Ct, NY County 2022] [impossibility rejected where tenant did not use the premises for three months of a five-year lease term], citing *558 Seventh Ave. Corp.*, 194 AD3d 561).

Counsel’s attempt to distinguish *170 Broadway Retail Owner* is similarly unpersuasive. In that decision, the First Department dismissed plaintiff tenant’s cause of action for rescission, reasoning in part that the doctrine of impossibility was unavailable since Executive Order 202.8 already had expired (*170 Broadway Retail Owner*, 195 AD3d at 576-577). Counsel suggests this reasoning should not be applied to instant tenant, which is a defendant, not a plaintiff. This argument is illogical, as a salient point of the court’s reasoning was that the executive order at issue expired. The present action was also commenced after the COVID executive orders expired. Accordingly, the court holds that the affirmative defense of impossibility is inapplicable.

The court further holds that the affirmative defense of frustration of purpose is inapplicable. As noted above, the First Department summarily rejected commercial tenants’ use of COVID-19 as a basis for this defense. *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.* (204 AD3d 536, 537 [1st Dept 2022]) is instructive. There, the First Department dismissed this defense when it was raised by an adult congregate center required to pause operations during the pandemic under an executive order, concluding the closure was temporary and emphasizing that tenant held a ten-year lease. Likewise, tenant here is subject to a long-term lease and the closure, pursuant to an executive order, was temporary.

Next the court considers guarantor’s assertion that Administrative Code § 22-1005, or the “the guarantor law,” excuses her from personal liability. A guarantor is relieved of liability under the guarantor law when two requirements are met. The first requirement is satisfied if Executive Order 202.3 forced a tenant to stop “serving patrons food...for on-premises consumption or to cease operation under executive order number 202.3.” This language

corresponds to 202.3's explicit directives that "any large gathering or event (concert, conference, worship service, performance before a large audience, etc.) shall be cancelled or postponed if more than fifty persons are expected in attendance" and "[a]ny restaurant or bar... shall cease serving patrons food or beverage on-premises..." (9 NYCRR § 8.202.3). The first requirement is also satisfied by non-essential retail establishments and personal care service establishments that were subject to in-person limitations of Executive Order 202.6 and 202.7, respectively (Administrative Code § 22-1005; 9 NYCRR §§ 8.202.7, 8.202.8). The guaranty law's second requirement is that the default was within March 7, 2020 and June 30, 2021.

Defendant maintains she was forced to cease business operations due to Executive Order 202.3, and in the alternative, that she acted under the good faith belief that her business was subject to it. The permitted use clause of tenant's lease does not describe the business as a restaurant (NYSCEF Doc, No. 18, lease *2). The court cannot classify tenant's business as a restaurant merely because food played a role in its operation. There is no allegation that the business postponed or canceled events because more than fifty people were scheduled to attend.⁶ The business also does not fit within the other covered categories of Executive Orders 202.6 and 202.7; it was not a non-essential retail establishment or a provider of personal care services. Therefore, tenant's business was not a business covered by the executive orders and Kehati is not a covered guarantor.

None of the remaining affirmative defenses raise a triable issue of fact to defeat plaintiff's application for summary judgment on liability. The court also notes that the portion of defendants' fifteenth affirmative defense, which seeks legal fees, is improperly pled. "The claim for legal fees must be dismissed because an affirmative defense cannot seek affirmative relief" (*ESRT 501 Seventh Ave., L.L.C. v Soraya Couture Inc.*, 2022 NY Slip Op 31723(U), *6 [Sup Ct, NY County 2022] citing *P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 199-200 [1st Dept 2009]).

However, the court finds the sixth affirmative defense raised issues of fact insofar as the litigants' affidavits presented conflicting views of the actual amount owed. Defendants raised questions related to the accuracy of landlord's payment records and the failure to provide corroborating billing statements for additional rent items. A trial is needed to determine damages and the appropriate amount of attorney's fees to plaintiff, the prevailing party. It appearing to the court that plaintiff is entitled to judgment on liability and the only triable issues of fact arising on the motions for summary judgment relate to the amount of damages plaintiff is entitled, it is

ORDERED that plaintiff's motion is granted regarding liability; and it is further

⁶ As part of this analysis, the court considered *373-381 PAS Assoc., LLC v Ideko Prods., LLC* (214 AD3d 401, 401-402 [1st Dept 2023]) where an events coordinator and guarantor were not excused from liability. In this March 2023 decision, the First Department noted that no executive order required the business to cease operations and the premises was tenant's office space, not the location of tenant's events. *Assuming arguendo* the court classified the instant premises as an event space or catering location, the affirmative defenses of frustration and impossibility are inapplicable as is the guaranty law for the reasons explained above.

ORDERED that an inquest on damages and attorney's fees, shall be held on November 30, 2023 at 10:00 AM, in Part 36, Room 205, at 71 Thomas Street; and it is further

ORDERED that by October 4, 2023, plaintiff shall advise the court via NYSCEF and email to the Part 36 clerk at SFC-Part36-Clerk@nycourts.gov whether plaintiff intends to submit its proof on papers pursuant to 22 NYCRR 202.46(b) and if plaintiff so intends shall submit its written proof by October 18, 2023 to the Part 36 clerk at SFC-Part36-Clerk@nycourts.gov; and it is further

ORDERED that plaintiff shall mail a copy of this order to defendant within 10 days of the date of the order; and it is further

ORDERED that pursuant to CPLR 3215 (b) defendants shall provide written notice to plaintiff's counsel and the Part 36 clerk so as to be received by, November 1, 2023, whether defendants intend to appear at that the inquest and contest the amount of damages sought by plaintiff; and it is further

ORDERED that in the event that defendants do not provide timely written notice that they intend to appear at the inquest and plaintiff submits its proof of damages by properly executed affidavit(s) or affirmation(s), plaintiff is not required to appear on November 30, 2023 and the determination as to damages will be rendered on plaintiff's written submissions unless the court directs otherwise after receipt of plaintiff's written submissions; and it is further

ORDERED that defendant's cross-motion is denied.

This constitutes the decision and order of the court.

July 14, 2023



HON. VERNA L. SAUNDERS, JSC

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