

**301 W. 96th L.P. v Chauca**

2023 NY Slip Op 32442(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 653300/2021

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. 653300/2021

301 WEST 96TH L.P.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ESTELA CHAUCA and JHESSICA CHAUCA,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16 were read on this motion to/for MONEY JUDGMENT.

Plaintiff seeks summary judgment in lieu of a complaint in the amount of \$540,360.11 as against guarantor defendants and an order directing a hearing as to reasonable attorney's fees (NYSCEF Doc. No. 2, *Notice of Motion*).

Plaintiff entered into a commercial lease with JJC Riviera Maya, Inc (hereinafter, "tenant"), for the use of its premises in which to operate a restaurant for a term, commencing November 11, 2016, and expiring on November 30, 2026. Defendants, owners and operators of the restaurant, executed a guaranty for the tenant. Plaintiff submits that insofar as the tenant, who abandoned the premises prior to commencement of this action, defaulted in its obligation to pay rent and additional rent under the lease, defendants are liable for the default (NYSCEF Doc. No. 4, *Affidavit in Support*). Specifically, plaintiff asserts that defendants are responsible not only for the unpaid rent and additional rent but also the damages resulting from the lease termination as provided for in the agreement. Plaintiff seeks \$167,918.40 for rent and additional rent due through March 2021; \$1,160,902.00 for rent and additional rent from December 2021 through the lease expiration on November 30, 2026; \$46,967.71 representing the rent concession conditionally provided to defendants; minus \$835,428.00 plaintiff will receive under its new lease agreement. In support, plaintiff annexes the lease agreement, guaranty, a rent ledger detailing unpaid rent and additional rent accruing from November 2016 through March 2021, and the new lease agreement.

Defendants oppose the motion arguing that due to the effects of the COVID-19 pandemic, they were forced to close their business and on March 5, 2021, after several months of unsuccessful negotiations with plaintiff, they returned the keys to plaintiff and vacated the premises. Defendant contends that pursuant to Administrative Code 22-1005, plaintiff is barred from recovering based upon the personal guaranty (NYSCEF Doc. No. 12, *Affirmation in Opposition*).

In reply, plaintiff avers that the guaranty law is unconstitutional, that a large portion of the monies sought predate the guaranty law, and defendants have failed to provide evidence sufficient to preclude summary judgment. (NYSCEF Doc. No. 14, *Reply Affirmation*).

“When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” (CPLR 3213).

A movant seeking summary judgment in its favor must make 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 (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by the opponent to the motion “must be sufficient to permit a finding of proximate cause “based not upon speculation, but upon a logical inference to be drawn from the evidence”” (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986]).

As an initial matter this court will first address NYC Administrative Code § 22-1005. The NYC Administrative Code §22-1005 (“Guaranty Law”), bars enforcement of personal guaranties on commercial leases under certain conditions between March 7, 2020 and June 30, 2021, due to the COVID-19 public health emergency. The Guaranty Law provides, in relevant part,

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.

Here, the tenant operated a restaurant, which was required to cease serving patrons food or beverage for on-premises consumption pursuant to Executive Order 202.3. Moreover, the tenant abandoned the premises on or around March 5, 2021, prior to the lease expiration, therefore defaulting on their lease obligations. This court finds all arguments advanced by plaintiff with respect to the unconstitutionality and inapplicability of the guaranty law regarding the sums due between March 7, 2020, and June 30, 2021 unavailing. Accordingly, based upon the guaranty law, the personal guaranty executed by defendants, is unenforceable between March 2020 through June 2021, thus plaintiff is barred from seeking rent or additional rent from defendants for these months. Accordingly, summary judgment is denied as to sums which accrued during this period.

However, with respect to rent and additional rent owed prior to March 7, 2020, plaintiff has met its burden of establishing entitlement to judgment. Defendants' papers are devoid of arguments rebutting plaintiff's assertions regarding rent owed before March 7, 2020. As such, from a review of the ledger and the affidavit in support submitted by plaintiff, defendants are liable for \$30,675.31 in rent and additional rent through March 7, 2020.

Turning to the branches of plaintiff's motion seeking a judgment for the conditionally waived rent (rent concession) and the difference between what it would have received from the tenant and what it is expected to receive from its new tenant, paragraph E of the rent schedule annexed as exhibit A to the lease states,

if Tenant, at any time during the term of this Lease after Tenant has been granted all or a portion of the rent credit described in section B of this Exhibit A, breaches any covenant, condition or provision of this Lease, in addition to all other damages and remedies herein provided and to which Landlord may otherwise be entitled, landlord shall also be entitled to the repayment of any rent credit therefore enjoyed by Tenant, which sum shall be deemed additional rent hereunder and shall be due upon demand by Landlord (NYSCEF Doc. No. 5, *Lease*).

Additionally, Section 19.1 (b) and (d) of the lease provides that,

Landlord, at Landlord's option, may (i) relet the Premises, or any portion or the Premises, from time to time, in the name of Landlord, Tenant or otherwise, as determined by Landlord, to any person and on any terms, but Landlord shall have no obligation to relet the Premises, or any portion of the Premises, or to collect any rent (and the failure to relet the Premises, or any portion of the Premises, or to collect any rent shall not impose any liability or obligation on Landlord or relieve Tenant of any obligation or liability under this lease)...

Tenant shall also pay to Landlord, as damages, any deficiency between (i) the aggregate Rent for the period which otherwise would have constituted the unexpired portion of the Term (conclusively presuming the monthly Additional Rent for each year thereof to be 1/12 of Additional Rent that was payable for the year immediately preceding the termination, re-entry or obtaining of possession) and (ii) the rents, if any,

applicable to that period collected under any reletting of all or any portion of the Premises.

As clearly stated, upon a breach of the lease, plaintiff may seek repayment for any rent concession provided, as well as, any deficiency between the rent it would have collected but for the lease termination and the rent it will collect by reletting. Once a tenant abandons the leased premises prior to the expiration of a written lease, “the landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease” or the landlord “could accept the tenant’s surrender, reenter the premises and re-let them for its own account thereby releasing the tenant from further liability for rent” (*Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]). However, if the landlord re-lets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord’s expenses in reentering and re-letting and then to pay the tenant’s rent obligation (*Id.* citing *Underhill v Collins*, 132 NY 269 [1892]). It is undisputed that the tenant defaulted on its obligation to pay rent and abandoned the premises, which section 18.1(e) of the lease describes as a default. Consequently, plaintiff mitigated its injury by re-letting the premises in April 2021. However, insofar as the new lease agreement provides for a lower rent obligation than the agreement between plaintiff and the tenant, plaintiff is entitled to the deficiency. Defendants fail to raise an issue of fact as to these claims as its papers are silent with respect to these contentions.

As such, pursuant to the guaranty, defendants are also liable for \$46,967.71 representing the rent concession. Lastly, in accordance with this court’s ruling with respect to the guaranty law, defendants are liable for \$218,400.08 representing the difference between the rent obligations owed by the tenant under the lease and the amount of rent paid by the new tenant solely from July 2021 through the November 2026 lease expiration. Based on the foregoing, it is hereby

**ORDERED** that plaintiff’s motion for summary judgment in lieu of a complaint is granted to the extent set forth above; and it is further

**ORDERED** that judgment is awarded to plaintiff and as against defendants, jointly and severally, and the Clerk of the Court is directed to enter judgment against defendants in the amount of \$296,043.10, together with costs and disbursements; and it is further

**ORDERED** that that branch of the motion seeking attorney’s fees shall be referred to a special referee to determine; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, on defendants, as well as, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment in accordance with this decision and order; and it is further

**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office

(Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)); and it is further

**ORDERED** that any relief not expressly addressed herein has nonetheless been considered and is denied.

This constitutes the decision and order of this court.

July 14, 2023

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NONFINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: