Glenhill Assoc., LLC v Aeon Prods., LLC
2023 NY Slip Op 33039(U)
August 10, 2023
Supreme Court, New York County
Docket Number: Index No. 653501/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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GLENHILL ASSOCIATES, LLC,
Plaintiff,

- v -

AEON PRODUCTIONS, LLC, and
ALAIN SAJOUS,
Defendants.

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INDEX NO. 653501/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49

were read on this motion to/for **SUMMARY JUDGMENT**.

This action concerns the recovery of damages based on breach of a commercial lease and personal guaranty. In its summons and complaint, plaintiff alleges that as of July 20, 2018, it entered into a commercial lease with Aeon Productions LLC ("tenant") for Suite 1815 in the building located at 307 West 38th Street, New York, New York 10018, through on July 31, 2023. Together with the commercial lease, Alain Sajous ("guarantor" or "Sajous"), executed a guaranty as to tenant's financial obligations under the lease. Plaintiff posits that on December 19, 2019, plaintiff and tenant, entered into a stipulation of settlement in connection with a commercial landlord-tenant proceeding captioned *Glenhill Associates, LLC v Aeon Productions, LLC*, L&T Index No. 069004/2019, in the Civil Court of the City of New York wherein a money judgment was entered against tenant in the amount of $54,579.18, of which the entirety remains unpaid and owing. It is further alleged that in addition to the money judgment, as of May 17, 2021, tenant has failed to pay additional rent due under the lease in the sum of $158,805.72, bringing the sum total arrears to $213,384.90. Plaintiff sets forth that a demand letter was sent to guarantor to pay plaintiff the total arrears of $213,384.90 but he has failed to make any payments. Thus, plaintiff seeks damages from tenant based on breach of contract in the principal sum of $158,805.72, plus interest thereon from August 15, 2020 (first cause of action); and damages for breach of guaranty in the principal sum of $213,384.90, plus interest thereon from April 1, 2020, plus plaintiff's attorneys' fees and disbursements incurred (second cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

In their answer, defendants deny plaintiff's allegations and assert the following affirmative defenses: financial hardship due to COVID-19 (first affirmative defense); frustration of purpose and impossibility of performance (second affirmative defense); inadequate service (third affirmative defense); failure to state a cause of action (fourth affirmative defense); lack of personal jurisdiction (fifth affirmative defense); and improper process (sixth affirmative defense). They also assert the following counterclaims: recission based on frustration of purpose (first counterclaim); recission based on impossibility of performance (second counterclaim); and attorneys fees (third counterclaim) (NYSCEF Doc No. 25, *verified answer*).

Plaintiff filed a reply asserting that defendants' first and second counterclaims require legal conclusions, and likewise denied the third counterclaim. Plaintiff also asserts the following affirmative defenses to the counterclaims: all the counterclaims fail to state a claim upon which relief can be granted (first affirmative defense to the counterclaims); and defense is founded on documentary evidence, namely, the lease and guaranty (second affirmative defense to the counterclaims) (NYSCEF Doc. No. 26, *reply to counterclaims*).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in its favor and against defendants; dismissing the affirmative defenses and counterclaims; directing the Clerk of Court to enter a money judgment against defendants, jointly and severally, for the principal sum of $205,999.03, plus interest thereon from December 1, 2020; directing the Clerk of Court to enter a money judgment against guarantor, individually, for the additional principal sum of $54,579.18 (representing the amount of the Civil Court money judgment), plus statutory judgment interest thereon from December 19, 2019; and scheduling a hearing to determine the amount of attorneys' fees for which defendants are liable to plaintiff (NYSCEF Doc. No. 27, *notice of motion*).

Plaintiff argues that its causes of action should be granted because the lease, guaranty and the Civil Court judgment establish defendants' liability. Specifically, plaintiff posits that Article 27 of the lease entitled "Inability to Perform," provides that the COVID-19 pandemic, including any governmental rule, order or regulation, or any emergency, does not relieve tenant of its obligation to pay rent. To this point, plaintiff proffers the affidavit of Sekyung Kim ("Kim"), the building manager of the leased premises, who reiterates the facts as alleged and states that pursuant to Articles 19 and 67 of the lease and ¶10 of the guaranty, defendants must pay plaintiff's legal fees and expenses incurred in commencing and prosecuting this action (NYSCEF Doc. No. 35, *Kim affidavit*). Kim avers that through the date of motion, defendants owe plaintiff a sum total of $205,999.03 (i.e., excluding the principal amount of the Civil Court money judgment and the plaintiff's legal fees). Plaintiff maintains that defendants' affirmative defenses and counterclaims should be dismissed because neither COVID-19 pandemic nor Executive Order 202.6 relieved tenant of its obligation to pay rent because tenant took possession of the premises in 2018, remains in possession, and continues to conduct its business therein.

Plaintiff also asserts that in a landlord's action for rent, impossibility and frustration of purpose have not been found to be viable defenses (NYSCEF Doc. 44, *memo of law, pg 16-18*). Plaintiff argues that defendants' affirmative defenses premised on a lack of proper service fail insofar as the summons and complaint were properly served on defendants as demonstrated by affidavits of service (*id.*, at pg 20). As for defendants fourth affirmative defense for failure to state a claim, plaintiff asserts that such defense should be dismissed because the entire complaint and motion are premised on documentary evidence, namely the lease, the guaranty, the ledger, and the Civil Court judgment. Concerning the counterclaims, plaintiff contends that recission based on frustration of purpose (counterclaim one) and recission based on impossibility (counterclaim two) are duplicative of its second affirmative defense and must be dismissed because the doctrines of frustration of purpose and impossibility are not viable pursuant to Article 1(h) and Article 22 of the lease, and that defendants' demand for attorney's fee (counterclaim three) must be dismissed for the additional reason that they are barred by the explicit terms of the lease (*id.*, at pg 21).

In opposition, defendants contend that, contrary to plaintiff's position that the lease provides adequate grounds to grant its motion, Article 27 of the lease is ambiguous as to whether the parties envisioned a government shutdown of the magnitude of the March 2020 mandated shutdown,

creating an issue of fact. They argue that, because the New York State Governor's Executive Order was set to be indefinite, tenant was forced to cease all business activities, as it fully fell under the non-essential commercial activity label. Defendants further assert that the court should not rely on Kim's affidavit as it cannot be considered documentary evidence under CPLR 3211(a)(1), and the facts stated therein can be refuted by another fact affidavit (NYSCEF Doc. No. 48, *opposition, pg 6*).

Concerning the frustration of purpose affirmative defense, defendants maintain that while they had physical possession of the premises during the COVID-19, they could not use the premises for their intended purpose as a web series production and creative arts studio, and thus, the purpose of the lease was frustrated by the unforeseeable COVID-19 pandemic and related shutdowns. Plaintiff's references Article 1(h) and Article 22 of the lease, claiming same are inapposite because Article 1(h) simply provides that the defendant will pay rent on time, at the first of the month, with no set-off, counterclaim or deduction whatsoever, and that Article 22 contains no language whatsoever regarding an emergency (*id.*, at pg 9-10). Defendants assert that insofar as plaintiff failed to fulfill its contractual obligations to provide the premises to tenant due to the COVID-19 pandemic, it has failed to state a claim for the rental arrears. Defendants further articulate that 1932-A/Local Law 2020/055 prohibits the enforcement against individual guarantors of their obligations under commercial leases for certain establishments affected by the COVID-19 pandemic with respect to defaults occurring during March 7, 2020 and September 30, 2020, and hence, guarantor should not be held personally liable for rent during the relevant time (*id.*, at pg 10-11). Lastly, defendants set forth that there is currently a non-payment summary proceeding pending between the parties requesting the exact same relief as in the instant action, and therefore, the instant action is wholly improper under well settled New York law.

In reply, plaintiff maintains that it has established defendants' liability through documentary evidence and defendants have not proffered any documents to rebut same. Plaintiff argues that since the facts set forth in Kim's affidavit is based on her review of plaintiff's books and records kept in the ordinary course of business, it is entirely admissible as a business record of plaintiff, contrary to defendants' assertion. In addition, plaintiff posits that since the executive orders issued during the COVID-19 pandemic did not require tenant to shut down operations completely in the premises, the purported prohibitions brought about during the COVID-19 period do not constitute an impossibility and a complete frustration of purpose, as argued. As to defendants' contention that Article 27 of the lease is ambiguous as to a government shutdown, plaintiff reiterates that Article 27 of the lease, entitled "Inability to Perform," unambiguously provides that any governmental rule, order or regulation, or any emergency, does not relieve tenant of its obligation to pay rent, and therefore, does not raise an issue of fact (NYSCEF Doc. No. 49, *reply, pg 7-8*). Concerning the claim that a summary proceeding is currently pending, plaintiff asserts that no such action involving the same issues in the instant matter exists between the parties, and that the New York City Civil Court matter, Index No. 069004/2019, which resulted in a money judgment of $54,579.18 against tenant has already been disposed of. Plaintiff claims that defendants' fourth affirmative defense that plaintiff has "failed to state a claim for rent arrears because [p]laintiff has failed to fulfill its contractual obligations to provide the premises to the [d]efendant due to the COVID-19 pandemic" is without merit insofar as the entire premise of the plaintiff's motion is governed by documentary evidence, namely the lease and the guaranty (*id.*, at pg 9). Lastly, plaintiff contends the New York City Administrative Code § 22-1005 does not shield guarantor from being personally liable for arrears from March 6, 2020 through September 30, 2020 because tenant is a media production company, not a retail or restaurant, and the default began in March 2019, well before the period of applicability of the Code (*id.*, at pg 10-11).

It is well-settled that the proponent of a summary judgment motion 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated" (CPLR 3212 [f]; *see Zuckerman*, 49 NY2d at 562).

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 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. It is undisputed that there is a lease and guaranty agreement and plaintiff performed. The rent ledger, along with the Kim's affidavit and the Civil Court money judgment, establish defendants' nonpayment. Plaintiff further establish that the debt remains unpaid.

Defendants fail to raise an issue of fact sufficient to defeat the motion. Turning to the affirmative defenses of impossibility and frustration of purpose, this court notes that impossibility 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. v Times Sq. Photo,* 194 AD3d 561, 561-562 [1st Dept 2021], *appeal dismissed* 37 NY3d 1040 [2021]). "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Warner v Kaplan*, 71 AD3d 1, 6 [2009]). Indeed, the First 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,* 217 AD3d 480, 481 [1st Dept 2023]). 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 limited 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. v Times Sq. Photo,* 194 AD3d 561). Defendants, likewise, have failed to demonstrate that Article 27 of the lease is ambiguous and that a national emergency such as the COVID-19 was not envisioned in the lease, raising an issue of fact as to the foreseeability of the pandemic (see *ESRT Empire State Bldg., L.L.C. v MG Holding Corp.*, 2022 NY Slip Op 33348(U) **8 [Sup Ct, NY County 2022]). Therefore, the portion of the summary judgment motion seeking dismissal of defendants' frustration of purpose and impossibility of performance affirmative defense (second affirmative defense) is granted.

Next, the court considers guarantor's assertion that Administrative Code § 22-1005, or the "the guaranty law," excuses him from personal liability for rental arrears under the lease. The First Department has highlighted that "regardless of when a tenant's lease default occurred, the critical time frame for determining when the protections of Administrative Code § 22-1005 attach is the time of the 'event causing such natural persons to become . . . liable'" (*3rd & 60th Assoc. Sub LLC v Third Ave. M & I, LLC*, 199 AD3d 601, 602 [1st Dept 2021]). 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." 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. Tenant, a media company, maintains that, as a non-essential business subject to Executive Orders 202.6 and 202.7, guarantor is afforded protections under Administrative Code § 22-1005. The permitted use clause of tenant's lease describes the business as a media company, and it is not subject to Executive Order 202.6 (NYSCEF Doc, No. 36, *lease,* ¶2). Furthermore, defendants have not demonstrated that tenant is a non-essential retail establishment as contemplated by the guarantor law. "Simply put, tenant does not operate a retail location" serving consumers goods, and defendants have not established that tenant was required to cease operations pursuant to Executive Order 202.7 either, such that it can satisfy New York Administrative City Code §22-1005 (1)(c) (see *Mozzy, Inc. v SK Ironstate LLC*, 2022 NY Slip Op 32865(U)**3 [Sup. Ct., NY County 2022]; *133 E. 58th St., LLC v Honors N.Y. Ctr. for Bridge, Inc.*, 2022 NY Slip Op 32772(U) **7 [Sup Ct, NY County 2022]). Hence, tenant's business was not a business covered by the guarantor law and Sajous is not absolved from liability.

Plaintiff seeks dismissal of defendants' remaining affirmative defenses, arguing they are all boilerplate and conclusory. A review of those affirmative defenses reveals they are all merely one sentence long and consist of bare legal conclusions. Dismissal of these affirmative defenses is therefore appropriate (*Bankers Trust Co. v Fassler*, 49 AD2d 855, [1st Dept 1975]; *366 Audubon Holding, LLC v Morel*, 22 Misc 3d 1108[A], 2008 NY Slip Op 52615(U) ****4 [Sup. Ct., NY County 2008]). Moreover, insofar as defendants have not addressed plaintiff's motion seeking dismissal of those affirmative defenses, they are deemed abandoned (see *Joon Song v MHM Sponsors Co.*, 176 AD3d 572, 753 [1st Dept 2019]; *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]). Insofar as the counterclaims are identical to the affirmative defenses, they are also dismissed.

The court also grants that portion of plaintiff's summary judgment motion seeking reasonable attorneys' fees and costs for instituting this action insofar as such right is provided for in Article 19 and 67 of the lease, where is it stated that an enforcement action is entitled to an award of such costs

(NYSCEF Doc. No. 36, *lease*, ¶19, 67). All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that plaintiff's motion seeking summary judgment against defendants is granted in its entirety; and it is further

ORDERED that Clerk of Court shall enter a money judgment in favor of plaintiff and against defendants, jointly and severally, for the principal sum of $205,999.03, plus interest thereon from December 1, 2020; and it is further

ORDERED that Clerk of Court shall enter a money judgment in favor of plaintiff and against guarantor Alain Sajous in the principal sum of $54,579.18, plus statutory interest thereon from December 19, 2019; and it is further

ORDERED that the portion of plaintiff's motion for summary judgment seeking attorney fees and other expenses incurred in this action is referred to a special referee; 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 decision and order with notice of entry upon defendants, as well as upon the Clerk of the Court, who shall enter judgment accordingly; 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/supctmanh).

This constitutes the decision and order of this court.

August 10, 2023

HON. VERNA L. SAUNDERS, JSC

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