1877 Webster Ave., Inc. v Tremont Ctr. LLC
2023 NY Slip Op 35150(U)
May 2, 2023
Supreme Court, Bronx County
Docket Number: Index No. 29239/2020E
Judge: Fidel E. Gomez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
--X
1877 WEBSTER AVE., INC.,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 29239/2020E

TREMONT CENTER LLC,

Defendant.
--X
TREMONT CENTER LLC,

Third-Party Plaintiff,

-against-

MICHAEL A. FRANKLIN,

Third-Party Defendant.
--X

Third-Party Defendant Michael A. Franklin ("Franklin") moves for an Order pursuant to CPLR § 3211(a)(1) and (a)(7), dismissing the Third-Party Complaint, with prejudice, on the ground that the third-party claim is barred by New York City Administrative Code § 22-1005.

For the reasons which follow, Franklin's motion is denied.

BACKGROUND

In the main action, Plaintiff 1877 Webster Avenue, Inc. ("1877") alleges causes of action against Defendant Tremont Center LLC ("Tremont") for declaratory judgment, lease termination, lease rescission and constructive eviction.

The Third-Party Complaint, verified by Tremont's Managing Agent Ben Reider, alleges one cause of action – breach of guaranty – based upon the following alleged facts: On or about November 15, 2019, Tremont and 1877 entered into a ten-year lease ("the Lease") for the commercial premises known as 396 East Tremont Avenue, Bronx, NY 10467 a/k/a corner retail entrance and basement in the building located at 1877 Webster Avenue, Bronx, NY 10467 ("the Premises"). Tremont is the owner and landlord of the Premises. The Lease expires by its terms on July 31, 2030. 1877 was to occupy the Premises for use as a nightclub for the term of the Lease. As an inducement for Tremont to enter into the Lease, Franklin[1] executed a Good Guy Guarantee ("the Guarantee") and thereby, absolutely, irrevocably and unconditionally guaranteed the full and prompt payment, performance and observance of all monetary obligations due from 1877 under the terms of the Lease. Franklin was prohibited from exercising the Guarantee for the first twenty-four (24) months following the Lease commencement date. It is alleged that 1877 breached the Lease by, inter alia, purporting to terminate the Lease prior to the expiration of the Lease term, failing to pay rent/additional rent, and failing to build-out the Premises for its intended use. It is further alleged that 1877 is obligated to pay all rent and additional rent reserved for the remainder of the Lease term by reason of the breach. Tremont re-let the Premises to another tenant with a rent commencement date of December 11, 2022. After application of the $50,000.00 security deposit, 1877 owes Tremont the amount of $192,012.98 in unpaid rent and additional rent for the period of July 1, 2021 through November 30, 2022. Franklin breached the Guarantee by failing to perform the obligations of 1877 owing to Tremont.

* * * * * * * * * *

In support of dismissal, Franklin submitted, inter alia, his affidavit wherein he states as follows: Franklin is the corporate principal of 1877 and is personally familiar with the facts and circumstances herein. On or about November 15, 2019, Tremont and 1877 entered into a ten-year lease for approximately 10,600 square feet of space on the ground floor and basement in the building located at 396 East Tremont Avenue, Bronx, NY 10467 ("the Lease"). Pursuant to Section 1.01 of the Lease, the sole purpose of the Lease was for the use of the Premises ". . . as a first class Nighclub and for no other purpose." Under Section 57 of the Lease, titled "Shop

[1]Pursuant to an affidavit submitted by Franklin, he is 1877's corporate principal.

Conventions/Restaurant Use," 8177 was permitted to install a kitchen and serve food. Pursuant to Section 3.02, 1877 was granted a five (5) month build-out, without rent, until on or about April 15, 2021 when rent would then be due. The Certificate of Occupancy permits a maximum capacity of 535 persons at the Premises. Under the Guarantee, Franklin personally guaranteed certain amounts due under the Lease, including rent and additional rent, while 1877 remained in the Premises. In March 2020, due to the Covid-19 pandemic, Governor Andrew Cuomo ordered that non-essential businesses shut down. 1877 was required to shut down before they could even open, and was not permitted to conduct business of any kind at the Premises. On or about March 16, 2020, Executive Order 202.3 was issued by Governor Cuomo ". . . requiring 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, at any location in New York State until further notice." Restaurants and drinking establishments were also ordered to shut down. On or about March 18, 2020, Executive Order 202.6 was issued by Governor Cuomo permitting only "essential" businesses to remain open. Over the next several months, the pandemic grew worse and New York state continued to require that 1877 remain shut. Through counsel, Franklin began contacting Tremont expressing his concerns moving forward, and their inability to open by the April 15, 2020 build-out date and commencement of rent. Franklin alleges that "[w]e were unable to open and, with no end in sight, and no income or business whatsoever to pay any rent, on June 29, 2020, [Franklin's attorney] sent Tremont a letter via regular mail and email advising that 1877 would vacate the Premises, surrender possession, turn over the keys, and request the deposit and first month's rent back." At the time 1877 sent the letter of early termination, Franklin asserts, he was relying on legislation that had recently been passed, i.e., New York City Legislation Int. No 2083-A, which amended Administrative Code § 22-1005 ("the Guaranty Law"), which provided that certain guarantees, such as the Guarantee, were not enforceable. Franklin avers that both he, and therefore 1877, meet the two-prong standard of the Guaranty Law because: (1) the nightclub is a "non-essential retail establishment subject to in-person limitations" which was not permitted to serve food or alcohol and (2) the default of the Lease occurred on June 29, 2020. At the time Franklin executed the Lease, and at all times thereafter, he never expected a pandemic or other event which would shut down New York City and the country, nor did he expect governmental shutdown orders similar to the ones imposed by Governor Cuomo. Finally, Franklin claims that the $192,012.98 judgment sought by Tremont "would shock the conscience under the circumstances" because Franklin would lose his investment in a business which was shut down before it could open and, in good faith, he vacated and surrendered and turned in the keys to the Premises on June 29, 2020, during the government shutdown. At the time of the termination, Franklin alleges, Tremont "lost at most one and [a] half months of rent."

In opposition to dismissal, Tremont contends that it has sufficiently pleaded a cause of action for breach of guaranty against Franklin, and that the Guaranty Law does not bar Tremont's claim as a matter of law. In support of its contentions, Tremont submitted, inter alia, the affidavit of Ben Reider, an authorized agent of Chestnut Holdings of New York Inc., the management company for Tremont. In his affidavit, Reider states, inter alia, as follows: He is fully familiar with the facts and circumstances of this action based on his personal knowledge and upon a review of the tenant file and documents kept in the ordinary course of Tremont's business. Reider has personal knowledge of Tremont's regular business practices and procedures regarding Tremont's leases and renewal leases and tenant ledgers, including electronically submitted data. On November 15, 2019, 1877 (Tenant) entered into the Lease for the Premises. The term of the Lease was to commence on November 15, 2019 and end on July 31, 2030. 1877 leased the Premises to operate a nightclub and was obligated to obtain all permits, approvals, and certificates in order to conduct business in the Premises, and comply with all laws, orders and regulations with respect to its occupancy of the Premises at its sole cost and expense. Pursuant to Section 46.03(I) of the Lease, Tenant shall "[c]ontinuously and uninterruptedly occupy and use and conduct business in the entire Premises for the uses permitted hereunder (i.e., a Night Club) throughout the entire term of the Lease and any renewals or extensions thereof." Pursuant to Article 24 of the Lease,

> Tenant acknowledge[d] that it inspected the Premises, was fully familiar with the physical condition thereof, and agree[d] to accept the Premises at the commencement of the Term in its then "as is"

> condition. Tenant acknowledge[d] and agree[d] that Landlord shall have no obligation to do any work in or to the Premises in order to make it suitable and ready for occupancy and use by Tenant.

Pursuant to Article 53 of the Lease, titled "Tenant's Initial Alteration Work," Tenant was obligated to retain a registered architect and/or a licensed professional engineer, at its sole cost, and submit to Tremont for its approval all drawings and specifications for the installation of any and all alterations, installations, decorations and improvements in the Premises to prepare same for its initial occupancy thereof.

Reid states that 1877 was given a five (5)-month rent concession in order to complete all work and obtain any licenses necessary to conduct business in the Premises for its intended purpose. Reid alleges that 1877 "refused to renovate the Premises and failed to take any steps to actually turn the space into a viable event space or night club." In May 2020, 1877's application for a liquor license was denied by the New York City State Liquor Authority.[2] 1877 was advised to submit a written request for reconsideration or a request for a disapproval hearing. "Upon information and belief," Reid states, "[1877] failed to take any steps after May 2020 to obtain its liquor license." On or about June 29, 2020, 1877 attempted to terminate the Lease due to financial hardship. Tremont did not accept 1877's purported surrender or modify any of 1877's obligations due under the terms of the Lease at any point thereafter. Reid avers that 1877's abandonment of the Premises constitutes a default under Section 6.01(f) of the Lease. Reid alleges that, under Articles 7 and 28 of the Lease, 1877 remained responsible to pay all rent and additional rent reserved under the Lease from the date of its breach through the end of the Lease term, or until the Premises was re-let. Tremont listed the Premises for rental with its brokers, and re-let the Premises with a rent commencement date of December 11, 2022. The new tenant was given a rent concession for the month of November 2022. Any restrictions on 1877's intended use of the Premises by virtue of the Covid-19 shutdowns were lifted as of July 1, 2021. 1877 failed to pay any rent or additional rent due under the terms of the Lease for the period of

[2]Franklin acknowledges said denial.

July 1, 2021 through November 30, 2022. After application of the $50,000.00 security deposit, Reid asserts, 1877 owes Tremont the amount of $192,012.98 in unpaid rent and additional rent due for the period of July 1, 2021 through November 30, 2022. Franklin signed the Lease on behalf of 1877 and executed the Guarantee in consideration of and as an inducement for Tremont to enter into the Lease.

Reid asserts that, pursuant to the Guarantee, Franklin "absolutely, irrevocably and unconditionally guaranteed to Tremont . . . [t]he prompt and full performance and observance by [1877] of all fixed annual rent, additional rent and any other charges accruing under the Lease." Reid asserts that Franklin was prohibited from exercising the Guarantee within the first twenty-four (24) months after the commencement date of the Lease, or until November 19, 2021. Reid contends that 1877 was in default of its obligations as of July 1, 2021, and remained in default through November 30, 2022. No part of the amount of $192,012.98 has been paid by 1877 or Franklin despite due demand for payment, and Tremont is not seeking any arrears due under the subject agreements between March 7, 2020 and June 30, 2021 in this action.

* * * * * * * * * *

Standard of Review

In deciding a motion to dismiss pursuant to CPLR § 3211, a court must "accept the facts alleged in the complaint is true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The pleading is to be afforded a liberal construction (*id.* at 87). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC,* 23 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]). "Where . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullman v Norma Kamali, Inc.,* 207 AD2d 691, 692 [1st Dept 1994]).

It is well settled that a defense based on documentary evidence is not dispositive "unless the documents submitted resolve all of the factual issues as a matter of law" (*Standard Chartered Bank v D. Chabbott, Inc,* 178 AD2d 112, 112 [1st Dept 1991]). Dismissal of the complaint pursuant to CPLR § 3211(a)(1), therefore, is only warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]).

When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d 11, 19 [2005]). On a motion made pursuant to CPLR § 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party (*Sokol v Leader,* 74 AD3d 1180, 1181 [2nd Dept 2010]). While "CPLR § 3211 allows a plaintiff to submit affidavits, [] it does not oblige him to do so on penalty of dismissal" (*Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 [1976]). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*id.* at 636). Thus, a plaintiff "will not be penalized because he has not made an evidentiary showing in support of his complaint" (*Rovello* at 635).

However, a court may consider evidentiary material submitted by a defendant, and if it does so, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer* at 275). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Lawrence v Graubard Miller,* 11 NY3d 588, 595 [1976] quoting *Rovello* at 636). Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer* at 275).

Discussion

There are two issues central to the motion before the court: (1) whether 1877 qualifies for relief under the Guaranty Law and (2) whether the Guarantee may be enforced against Franklin for any of the amounts allegedly owed Tremont under the Lease.

I. The Guaranty Law

During the first year of the Covid-19 pandemic, the New York City Council enacted the Guaranty Law, which protected certain guarantors of commercial leases from liability for defaulting tenants. The Guaranty Law provides that:

> 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 paragraph (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.

(Administrative Code of the City of N.Y. § 22-1005.)

In support of dismissal, Franklin contends that the allegations in the third-party complaint and the documents submitted in support of his motion establish that as a matter of law the Guarantee is unenforceable and, therefore, he cannot be held personally liable for $192,012.98. Therefore, Franklin asserts, the factual allegations in the third-party complaint fail to state a cause of action against him and the third-party complaint must be dismissed pursuant to CPLR § 3211(a)(7). In support of this contention, Franklin argues that 1877 and, therefore, Franklin qualifies under paragraphs 1(a) and 1(b) of the Guaranty Law. With respect to paragraph 1(a), Franklin notes that the only use for the Premises was for a nightclub whose C of O contemplates more than 50 persons. Franklin also points to Executive Order 202.3 which required 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." Franklin avers that large gatherings, events, event spaces, performances, and large audiences are the essence of a nightclub. Franklin also avers that Executive Order 202.3 "ceased operations of food and drinking establishments," which were permissible under the Lease and an "integral" part of 1877's business as a nightclub. With respect to paragraph 1(b), Franklin cites Executive Order 202.6, which permitted only "essential businesses" to remain open. Franklin contends that a nightclub is a nonessential retail establishment and that the Premises was subject to in-person limitations.

Franklin avers that the requirements of paragraph 2 of the Guaranty Law are met because the default occurred during the proscribed time period between March 7, 2020 and June 30, 2021. The court notes that it is undisputed that Tremont considered the breach to have occurred on June 29, 2020 when 1877 sent the "purported" termination letter by regular mail and email to Tremont, which date is within the protected period under the Guaranty Law.

Since the requirements of both paragraph 1 and 2 were satisfied, Franklin asserts, the Guarantee is void and unenforceable in its entirety.

* * * * * * * * * *

In opposition to dismissal, Tremont contends that Franklin has failed to demonstrate his entitlement to dismissal of the Third-Party Complaint because: (1) there is a dispute as to whether 1877 satisfies paragraph 1 of the Guaranty Law and (2) assuming *arguendo* that 1877 satisfied paragraph 1, paragraph 2 does not bar Tremont's claim against Franklin.

In regard to argument (1) above, Tremont disputes that paragraph 1(a) is applicable here because "there is nothing in the record to suggest that 1877 should be considered a restaurant or bar" for purposes of Executive Order 202.3, and because the Lease permitted 1877 to operate the Premises as a nightclub only – not a bar or restaurant. Tremont also notes that 1877 "failed to take any steps to actually renovate the space into a viable event space or night club after it entered possession." Tremont disputes that paragraph 1(b) applies because the Lease did not provide for the operation of a retail space. Even if 1877 were considered a "non-essential retail establishment or otherwise qualifies," Tremont contends that there is "still a question whether [1877] was required to close or cease operations in accordance with the Guaranty Law . . . [since] 1877 never opened to the public" in the first place. Tremont disputes that paragraph 1(c) applies because Executive Order 202.7 required that various personal care services be closed to the public, such as barbershops, hair salons, and tattoo/piercing parlors – and nightclubs were not included.

With respect to argument (2) above, Tremont contends that the Guaranty Law only prohibited enforcement of the Guarantee for rent/additional rent owed under the Lease for the period of March 7, 2020 through June 30, 2021. To that end, Tremont alleges that it is only seeking rent and additional rent for the period of July 1, 2021 through November 30, 2022. As such, Tremont submits, "the sole cause of action alleges that Franklin is liable under the [Guarantee] for periods outside the statute." Finally, Tremont alleges that: (I) Franklin was prohibited from exercising the Guarantee within the first twenty-four (24) months after the commencement date of the Lease, or until November 19, 2021, (ii) 1877 did not provide the requisite 120 days prior written notice of its intent to vacate, and (iii) 1877 abandoned the Premises in default of its obligations and remained in default until the Premises was re-let. The Court presumes that, with the foregoing, Tremont contends that it could not enforce the Guarantee during the period of time that Tremont contends Executive Order 202.3 prohibited the enforcement of guarantee agreements.

* * * * * * * * * **

For purposes of deciding the instant motion only, the Court assumes *arguendo* that 1877 satisfies the requirements of paragraph 1 of the Guaranty Law. Now this Court turns to whether paragraph 2 bars Tremont's claim for rent and additional rent which accrued during the period beginning July 1, 2021 through November 30, 2022, when the Premises was re-let and whether, as urged by Franklin, Executive Order 202.3 completely bars the enforcement of the Guarantee altogether.

As an initial matter, the Court notes that the parties do not dispute that the default under the Lease occurred during the relevant period so as to make the Guaranty Law applicable. The parties differ, however, as to the interpretation to be afforded the language set forth in paragraph 2 of the Guaranty Law. In essence, the issue at hand is whether the Guaranty Law applies to preclude enforcement of a good guy guarantee for rental obligations which accrue after the Law's expiration – June 20, 2021 – and throughout the remaining term of the Lease. Franklin contends that pursuant to the Guaranty Law, the Guarantee is essentially null and void and can never be enforced against him, thereby relieving him of any obligation to pay any rent or additional rent due under the Lease based upon 1877's default. Conversely, Tremont argues that the Guaranty Law only precludes enforcement of the Guarantee for any rents and additional rents which accrued during the period beginning March 7, 2020 and ending June 30, 2021, and that Franklin is therefore obligated to pay any rents/additional rents which accrued under the terms of the Lease *after* that period ended on June 30, 2021. Specifically, Tremont claims that it is entitled to receive payment from Franklin for all rents/additional rents which accrued during the period beginning July 1, 2021 through November 30, 2022, when the Premises was re-let.

* * * * * * * * * *

The fundamental rule of statutory interpretation is that a court should attempt to effectuate the intent of the Legislature (*Smith v Donovan,* 61 AD3d 505, 508 [1st Dept 2009]). Since the "clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577, 583 [1998]). "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning" (*id.*). "General principles may serve as guides in the search for the intention of the Legislature in a particular case but only where better guides are not available" (*id.* at 584).

Here, paragraph 2 of the Guaranty states that the guaranty agreement shall not be enforced when "[t]he default . . . causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive." However, the Law is silent as to whether the bar to enforcement is applicable for rental obligations which accrue after its expiration on June 30, 2021. Inasmuch as the Law itself does not expressly state whether a guarantor's obligations under a lease breached during the protected period are unenforceable after the Law's expiration, the Court looks to City Council's Notes to ascertain the legislative intent in enacting the Law. Note 1, Section 1, titled "Declaration of legislative intent and findings," which, after a multi-paragraph statistical analysis of deaths, job losses, business closings, severe economic damage, etc., states, in paragraph 7, as follows:

> For the foregoing reasons, the council passed, and the mayor signed, local law number 55 for the year 2020, which provides **temporary protections** to natural persons who personally guarantee the financial obligations of businesses subject to the substantial occupancy limitations imposed by the above-described executive orders issued by the governor. These protections are, however, due to expire on September 30, 2020.[3] (emphasis added).

Based upon City Council's explanation of its intent in enacting the Guaranty Law, it seems clear that the protections afforded guarantors of commercial leases under the Law were meant to be temporary.

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[3]The Law was amended on several occasions which amendments ultimately extended the expiration date to June 30, 2021.

Curiously, the parties rely on various trial court decisions in which New York courts have arrived at different conclusions on this issue but neither cites any appellate authority in support of their position. Significantly, in *274 Madison Company, LLC v Viera* (205 AD3d 403,404 [1st Dept 2022]) the First Department described the Guaranty Law as follows:

> Administrative Code § 22-1005 provides that lease guarantors of businesses that were required to cease operation or close to members of the public under any of the relevant executive orders (Nos. 202.3, 202.6, and 202.7) issued by the Governor in relation to the Covid-19 outbreak will not be held liable for unpaid rents of those businesses **owed between March 7, 2020 and June 30, 2021**. (emphasis added).

This is consistent with City Council's stated legislative intent in enacting the Guaranty Law.

This issue has been addressed in the federal courts as well. In *Melendez v City of New York* (503 F Supp 3d 13 [SD NY 2020]), three owners of small commercial and residential buildings brought an action against the city and related parties alleging that city ordinances enacted during the Covid-19 epidemic, including the Guaranty Law, violated their right to free speech, due process and the Contract Clause of the U.S. Constitution. In that case, plaintiffs moved for preliminary injunctive relief and declaratory relief, and defendants moved to dismiss all claims. Of note, in finding that none of the challenged laws violated any of plaintiffs' constitutional rights, the district court described the Guaranty Law as follows:

> The Guaranty Law only applies when the guarantor is a natural person other than the tenant, and only covers payments due between March 2020 and March 2021,[4] but its effects are permanent: the landlord may never collect from the personal guarantor for those payments, even after the pandemic ends.

(*id.* at 18). On appeal, Plaintiffs/Appellants argued, inter alia, that the Guaranty Law violated the Contracts Clause, but they did not challenge the district court's finding that the Law only covered payments due between March 2020 and March 2021 *(Melendez v City of New York* (16 F4th 992, 1001 [2d Cir 2021]). Ultimately, the Second Circuit vacated the district court's

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[4]The expiration date in effect at the time.

decision insofar as it denied plaintiff's motion for preliminary injunctive and declaratory relief without review, and remanded the case for further proceedings, including consideration of the merits of the reinstated preliminary injunction/declaratory judgment motion. (*id.* at 1047). In its discussion concerning the Guaranty Law, the Second Circuit described the law as "making commercial lease guaranties permanently unenforceable for rent arrears **arising between March 7, 2020, and June 30, 2021"** (emphasis added). To determine whether plaintiffs plead a plausible Contracts Clause claim, the court first asked whether the Guaranty Law "substantially impairs the contract rights of landlords . . . whose commercial lease agreements are secured by personal guaranties" (*id.* at 1032-1033). In this regard, the court found that plaintiffs had plausibly alleged a significant impairment of contract because the Guaranty Law "appears permanently and unexpectedly to repudiate commercial lease guaranties for arrears arising over a sixteen-month period" (*id.* 1035). The court then found that the City asserted a legitimate public purpose that appeared plausible on the pleadings' record and, therefore, further inquiry was required to determine whether the means employed by the City were reasonable and appropriate for its professed public purpose. (*id.* at 1038). Upon considering that issue, the court concluded that the "means question [could not] . . . be decided in defendants' favor as a matter of law and, therefore, that plaintiffs' Contract Clause claim [could not] be dismissed under Rule 12(b)(6)" (*id.*).

Significantly, on remand, the district court concluded that the Guaranty Law "violates the Contract Clause by rendering the guaranty clauses in plaintiffs' commercial leases unenforceable for unpaid rent during the covered period, March 7, 2020 and June 30, 2021" (*Melendez v City of New York*, 2023 WL 2746183, *16 [SD NY, March 31, 2023, No. 20-CV-5301 (RA)]).

Based upon the foregoing, Franklin has not demonstrated that the Guaranty Law bars enforcement of the Guarantee for the period of July 1, 2021 through November 30, 2022.

Accordingly, it is hereby

ORDERED that Third-Party Defendant serve a copy of this Decision and Order upon Defendant/Third-Party Plaintiff, with Notice of Entry, within thirty (30) days hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
May 2 , 2023

Hon. FIDEL E. GOMEZ, J.S.C.