SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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EMMANUEL ASSOCIATES, LLC,

Plaintiff,

- v -

ANTHONY CULLINAN, VICTOR LEE, ADAM LEITMAN BAILEY, P.C.,ADAM LEITMAN BAILEY, JOANNA C. PECK,

Defendant.

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INDEX NO. 159627/2022

MOTION DATE 10/03/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187
were read on this motion to/for JUDGMENT - SUMMARY.

In this action alleging breach of contract, plaintiff Emmanuel Associates, LLC ("Emmanuel") moves for summary judgment on its first cause of action against defendant Anthony Cullinan ("Cullinan"), dismissal of Cullinan's affirmative defenses, and summary judgment dismissing Cullinan's counterclaims against it. Cullinan cross-moves for summary judgment dismissing the entirety of Emmanuel's Complaint.

The facts underlying the motion and cross-motion are recited at length in the Court's Decision and Order of October 5, 2023 ("Prior Decision") and are incorporated by reference herein. In relevant part, Cullinan formed an entity, nonparty 937 Second Ave Corp. ("937 Second") to operate a restaurant in a ground floor commercial space with a backyard ("Restaurant Space") at 937 Second Avenue in Manhattan ("the Building"). 937 Second leased the Restaurant Space from Emmanuel pursuant to an agreement dated July 24, 2020 (NYSCEF Doc. No. 132 "Lease"). Cullinan contemporaneously executed a guaranty for 937 Second's

obligations under the Lease (NYSCEF Doc. No. 134 "Guaranty"). 937 Second subsequently executed a First Amendment of Lease with Emmanuel (NYSCEF Doc. No. 133, "Amended Lease") for which Cullinan executed an Amended Guaranty.

Emmanuel alleges that 937 Second defaulted under the Lease on or about December 1, 2021 and that Cullinan has breached his obligations under the Guaranty by failing to pay the rent arrears. Cullinan maintains that he entered the Guaranty, and caused 937 Second to enter the Lease, with the understanding that the restaurant would be able to use the sidewalk outside of the Restaurant Space. He claims that Emmanuel was aware of this requirement before the Lease and Guaranty were executed and that Victor Lee ("Lee"), Emmanuel's manager and a member of the Building's Board ("Board"), represented that he could "virtually ensure" the Board's consent to letting the restaurant use the sidewalk space. Cullinan asserts that Local Law 11 work commenced shortly after 937 Second leased the Restaurant Space that prevented use of the sidewalk for restaurant seating. He claims that Emmanuel was aware of the impending work before it entered the Lease and Guaranty and that neither he nor 937 Second would have entered these agreements had they known that use of the sidewalk would be unavailable.

On a motion for summary judgment, the moving party "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. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

To succeed on a claim for breach of a guaranty, a plaintiff must prove "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navaro*, 25 NY3d 485, 492 [2015], quoting *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). A guaranty "that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 493, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Emmanuel argues that it is entitled to summary judgment because there is no dispute as to an outstanding debt in the form of 937 Second's rent arrears and that Cullinan has failed to perform under the Guaranty by not paying them. In opposition and in support of his own motion for summary judgment, Cullinan maintains that he cannot be liable under the Guaranty because 937 Second was not able to use the sidewalk as promised in the Guaranty. In the alternative, he argues that Emmanuel's motion should be denied as premature as depositions have not taken place. In response, Emmanuel contends that the Guaranty expressly references the Lease and that its description of the space merely highlights the Lease and in no way acts as a term or condition of the Guaranty.

Here, there is no dispute as to the existence of the Guaranty and Expanded Guaranty. Emmanuel submits evidence of the underlying debt and Cullinan's failure to perform under the Guaranty via a copy of the rent ledger for the Restaurant Space reflecting $971,560.58 in rent arrears as of March 1, 2024, a Notice to Cure dated October 27, 2022, and a Notice of Termination dated May 10, 2023 (NYSCEF Doc. Nos. 186, 148, and 151). Cullinan argues in opposition that the definition of the "Premises" in the Guaranty clearly expresses the parties'

intent that he would only be liable for nonpayment of rent by 937 Second if it was allowed to use the front sidewalk outside the Restaurant Space. The Guaranty defines the Lease as follows:

> Agreement of Lease dated the date hereof between the Landlord and Tenant (the "Lease") relating to the ground floor, lower level space, outdoor backyard patio and outdoor front seating area (the "Premises") in the building known as 937 Second Avenue, New York, New York 10022 (the "Building") as more particularly described within the Lease.

(Guaranty at 1).

The operative definition of the premises in the Lease indicates that it comprises "the ground floor, lower level space, outdoor back yard patio as more specifically described in Exhibit 'A' annexed hereto" (Lease at § 1[A][v]). Exhibit A is blank and provides no further description of the Restaurant Space. The Amended Lease reiterates this definition of the leased premises and confirms that the Guaranty is in full force and effect (Amended Lease at 1, § 6). The Guaranty is clear and unambiguous on its face: Cullinan guaranteed the full and faithful performance of 937 Second under the Lease. The Lease and Amended Lease are likewise clear and unambiguous as to 937 Second's obligation to pay rent for the Restaurant Space, which the Lease expressly defines without reference to the front sidewalk area. Therefore, the Court finds Cullinan's argument unpersuasive. Cullinan's alternative argument that summary judgment is premature given the lack of depositions is similarly unpersuasive as such intrinsic evidence is unnecessary given that the Guaranty and Lease are unambiguous (*see Kocak v Dargin*, 199 AD3d 456 [1st Dept 2021]).

Emmanuel is therefore entitled to summary judgment on its breach of contract cause of action against Cullinan. The Court also dismisses Cullinan's affirmative defenses as they consist of bare legal conclusions for which Cullinan's opposition papers offer no support (*see, e.g., Chrysler E. Bldg., L.L.C. v Keenawa, Inc.*, 217 AD3d 494, 494-495 [1st Dept 2023]).

Cullinan further argues that the damages sought by Emmanuel are excessive. He relies on Section 2 of the Guaranty, which would limit his liability to rent arrears that accrued until March 2, 2023, the day 937 Second returned possession of the Restaurant Space to Emmanuel. In relevant part, this section provides a release of the guarantor's obligations accruing after the final day of occupancy "in the event that (a) Tenant is not in default under any terms of the Lease both when the Surrender Notice . . . is given and on the Final day . . . and (b) Tenant gives written notice . . . by certified mail . . . and (c) Tenant performs all of the [Release Conditions]" (Guaranty § 2). The Court finds that Section 2 of the Guaranty was not triggered because 937 Second was in default under the Lease beginning in December 2021 and the default was never cured. Accordingly, Cullinan is obligated to pay the full amount of rent arrears.

Cullinan's counterclaims against Emmanuel are dismissed. In its Prior Decision, the Court dismissed these same claims as against Lee on the grounds that Cullinan lacked standing to assert these same counterclaims to the extent that they arose out of the Lease or Amended Lease and that he waived his right to interpose counterclaims arising out of the Guaranty (Prior Decision at 7-8). The same holds true for the counterclaims asserted against Emmanuel.

Accordingly, Plaintiff's motion is granted, Defendant's cross-motion is denied, and it is hereby:

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff Emmanuel Associates LLC and against Defendant Anthony Cullinan in the amount of $971,560.58 with interest from the date of entry of this Order; and it is further

ORDERED that Defendant's affirmative defenses and counterclaims are dismissed.

All other relief sought is denied. This constitutes the Decision and Order of the Court

7/18/2024

DATE

LORI S. SATTLER, J.S.C.

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