SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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MEPT 757 THIRD AVENUE LLC

Plaintiff,

- v -

HAYIM GRANT,

Defendant.

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INDEX NO. 653267/2020

MOTION DATE 02/25/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 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, 48, 49, 50, 51, 52, 53, 54

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

The motion by plaintiff for summary judgment and to amend to conform to the evidence is granted and the cross-motion by defendant to dismiss the complaint is denied.

Background

Plaintiff owns a building located at 757 Third Avenue. It claims that non-party Corporate Suites 757 LLC (the "Tenant") entered into a fifteen-year lease that ends in June 30, 2024. Defendant Grant signed a guaranty in connection with this lease where he agreed to guarantee the obligations of the Tenant up to $500,000.

Plaintiff asserts that the Tenant failed to pay rent and it eventually commenced an action in Civil Court. That case was settled by stipulation on July 2, 2019 where the Tenant agreed in part to pay the then-existing rent arrears in the amount of $367,728.41 over an eleven-month period. Plaintiff claims that the Tenant defaulted by not making payments. It claims that the Tenant has incurred additional rent arrears and now owes more than the upper limit of the guarantee, so defendant is liable for $500,000.

In opposition and in support of his cross-motion to dismiss, defendant claims that the matter is not ripe for review because the Tenant's underlying debt has yet to accrue. He argues that the ongoing pandemic has limited the number of persons permitted to be in the premises (two floors in a commercial office building) and this has frustrated the purpose of the lease. Defendant maintains that the business model is to license the spaces to others and the Tenant is unable to find as many customers because of restrictions regarding workplace density. Defendant also points to an Administrative Code that prevents guarantors from being held liable where defaults were caused by Covid.

Defendant reads the guaranty to mean that he is not supposed to pay anything while the Tenant remains in the premises. He also takes issue with the affidavit submitted by plaintiff in support of the motion and insists that this affidavit does not justify the relief plaintiff demands.

In reply, plaintiff emphasizes that it has proven that the Tenant has defaulted and that the defendant unconditionally guaranteed the Tenant's obligations to pay rent and additional rent. Plaintiff points out that the building in question has remained open throughout the pandemic and that turnstile logs show that these floors were utilized throughout 2020.

In reply to its cross-motion, defendant insists that the affidavit from plaintiff's asset manager (submitted in reply) lacks the requisite personal knowledge about this particular Tenant. Defendant concludes that the occupancy restrictions made it impossible for the Tenant to pay the rent. The Court observes that plaintiff filed a sur-reply without first asking permission, so it will not be considered.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants plaintiff's motion. As an initial matter, the Court observes that there is no dispute that the Tenant has failed to make rent payments or that defendant signed a guaranty in connection with the lease. The events that defendant argues must happen before he can be held liable under the guarantee are, in fact, limitations on his liability (such as turning over keys to the landlord). There is no basis to find that these events must take place or that the Tenant must vacate the property *before* plaintiff can sue on the guaranty.

The branch of the motion to amend to conform to the proof is granted. There is no prejudice to defendant to include rent that has accrued since this case began; the subject matter of this action is about unpaid rent where the Tenant remains in the premises.

The Court also finds that the affidavits from the asset manager for plaintiff, Mr. Erdem, assert admissible facts sufficient for the Court to grant plaintiff the relief it seeks. The fact that the affidavits do not contain a certificate of conformity is not a fatal defect (*Wager Estate of Cordaro v Rao,* 178 AD3d 434, 435, 113 NYS3d 63]) [1st Dept 2019]) especially where the affidavit was notarized (albeit from an out of state notary). The Court can also overlook this mistake pursuant to CPLR 2001.

The central question on this motion concerns the frustration of purpose argument raised by defendant. "For a party to a contract to invoke frustration of purpose as a defense for nonperformance, 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. The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC,* 85 AD3d 506, 508 [1st Dept 2011] [internal quotations and citations omitted]).

Defendant's claim that restrictions on the number of people that can be present in the office space undoubtedly reduced the Tenant's revenue and likely reduced the Tenant's ability to meet its rental obligations given the nature of Tenant's business. The Tenant appears to make money by licensing office space, which means it makes more money by entering into more license agreements. But a reduction in potential revenue is not the same as completely frustrating the purpose of the contract. After all, the contract was to lease an office space and the

Tenant chose to run a particular business. It is not the landlord's concern how the Tenant tried to turn a profit from the premises.

Sometimes, outside factors reduce the profitability of businesses and in many cases those factors are outside the control of both the landlord and the tenant. But that does not mean that defendant can raise an issue of fact to simply rip up the contract. The pandemic has devastated businesses across New York City, but there is nothing in existing case law that would permit a Tenant (or a guarantor) to walk away from a contract on the ground that its business model is no longer as profitable as it used to be. Under such a theory, all manner of businesses could seek rescission of leases during a downturn in their particular business.

The Court also finds that the Administrative Code provision cited by defendant does not bar plaintiff's requested relief.

The subject provision provides that:

Personal liability provisions in commercial leases.

> 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 March 31, 2021, inclusive.

(Administrative Code of City of NY § 22-1005).

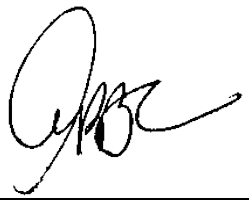
In this case, plaintiff commenced a landlord tenant case in 2019. Although plaintiff contends that there was a settlement of that case, plaintiff argues that the Tenant defaulted on that settlement. In other words, there is a demonstrated history of the Tenant not paying the rent prior to the pandemic. Moreover, there is no basis to find that the above code provision applies given that the premises did not close pursuant to various executive orders.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to amend the complaint pursuant to CPLR 3025(c) to conform to the proof submitted and for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $500,000 plus interest from the date of this decision along with costs and disbursement upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable attorneys' fees is severed and a hearing will be scheduled by the clerk of this part so the Court can determine the amount due; and it is further

ORDERED that the cross-motion by defendant is denied.



3/1/2021
DATE

ARLENE P. BLUTH, J.S.C.

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