

**Able Motor Cars Corp. v Three Bros. Chinese Cuisine Inc.**

2021 NY Slip Op 30716(U)

January 13, 2021

Supreme Court, Queens County

Docket Number: 709446/2020

Judge: Marguerite A. Grays

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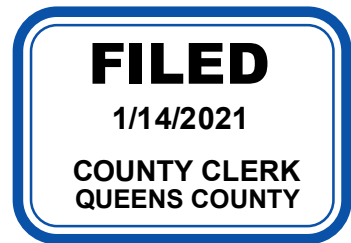
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**  
**Justice**

IAS PART 4



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ABLE MOTOR CARS CORP.,

Index  
No.: 709446/2020

Plaintiff(s),

Motion  
Dated: October 6, 2020

-against-

Motion  
Cal. No.: 1

THREE BROTHERS CHINESE CUISINE INC.,  
XING WU MEI

Motion  
Seq. No.: 1

Defendant(s).

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The following papers numbered EF3 - EF23 read on this motion by the defendants for an Order pursuant to CPLR §3211(a)(1) and (7), dismissing the complaint against them on the ground that this action has been suspended by an Executive Order issued by Governor Cuomo and the New York City Administrative Code.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF3 - EF10
Answering Affidavits - Exhibits .....	EF13 - EF19
Reply Affidavits .....	EF20 - EF23
Memoranda Of Law .....	EF5, EF15

Upon the foregoing papers it is ordered that the branch of the motion for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the Complaint against defendant Xing Wu Mei is granted. The branch of the motion for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing the complaint against defendant Three Brothers is denied.

**I. Background**

**A. The Complaint**

The plaintiff began the instant action on July 7, 2020 by the filing of a Summons and Complaint. The complaint alleges the following:

On or about September 4, 2019, plaintiff Able Motor Cars Corp. leased premises to Three Brothers Chinese Cuisine, Inc. within the Baybridge Commons Shopping Center in Bayside, New York. Defendant Xing Wu Mei, as President of Three Brothers, executed the lease for the tenant. On September 24, 2019, defendant Mei executed his personal guarantee of the tenant's obligations. Three Brothers defaulted under Article 6 of the Lease beginning with the nonpayment of part of the March, 2020 rent and to date owes over \$61,645.99 to the plaintiff. The defendant tenant is liable to the plaintiff for sums due under the lease and pursuant to his personal guarantee, defendant Mei is liable for the sums defaulted upon by Three Brothers,

The First Cause of Action seeks to recover damages against the defendant tenant for breach of its obligation to pay rent under the lease and against the defendant guarantor for breach of the guarantee. The Second Cause of Action is asserted against the defendants on the theory of an account stated. The Third Cause of Action seeks the recovery of attorney's fees and other expenses.

### **B. Relevant Law**

On May 7, 2020, Governor Cuomo issued Executive Order No. 202.28 which provides in relevant part:

“ IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through June 6, 2020:

- There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.”<sup>1</sup>

On March 16, 2020, Governor Cuomo signed Executive Order 202.3 restricting restaurants to food take-out and delivery.

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<sup>1</sup>The Executive Order has been extended from time to time.

Local Law 55, enacted by the New York City Council, provides in relevant part:

Section 1. Chapter 10 of title 22 of the Administrative Code of the city of New York is amended by adding a new section 22-1005 to read as follows:

§ 22-1005. Personal liability provisions in commercial leases. A provision in a commercial lease or other rental agreement involving real property located within the city 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;”

### **III. Discussion**

#### **A. Local Law 55**

Local Law 55 has no application to the defendant tenant. Defendant Three Brothers is the tenant, is not a “natural person,” and is not the guarantor of its own obligations under the lease.

Local Law 55 does apply to defendant Xing Wu Mei, who is a “natural person,” not the tenant, and the guarantor of defendant Three Brothers’ obligations under the commercial lease. There is no merit in the plaintiff’s argument that Local Law 55 is inapplicable to the instant case because the lease and the guarantee are two separate documents. Although Local Law 55 states “[a] provision in a commercial lease or other rental agreement” (emphasis added), the law cannot be read as strictly and literally as the plaintiff urges without frustrating the City Council’s intent. Moreover, the lease and the guarantee appear to have been signed on the same day and were notarized on the same day (September 24, 2019). “Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement \*\*\*” (*Williams v. Mobil Oil Corp.*, 83 AD2d 434 [1981]; *Cty. of Suffolk v. Long Island Power Auth.*, 100 AD3d 944 2012]). “To determine whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances \*\*\*” (*Cty. of Suffolk v. Long Island Power Auth.*, *supra*,

947). In the case at bar, the lease and the guarantee were both signed by defendant Mei, though in different capacities, apparently at the same time, and notarized at the same time, and the guarantee states that it was given as an inducement to the landlord to enter into the lease. Under all of the circumstances of this case, the lease and the guarantee should be treated as one document. Finally, in view of the fact that the plaintiff was paid 50% of the rent due for March, 2020 pursuant to an agreement among the parties, the Court finds, in order to advance the remedial purposes of the law, that its requirement that the default had to have occurred after March 7, 2020 was met for that month.

Thus guarantee given by defendant Mei cannot be enforced against him at this time, and the Complaint against him fails to state a cause of action.

### **B. Executive Order 202.28**

Executive Order No. 202.28 provides in relevant part: “There shall be no initiation of a proceeding ...of ... an eviction of any residential or commercial tenant, for nonpayment of rent \*\*\*facing financial hardship due to the COVID-19 pandemic \*\*\*.”

The parties have not cited any cases or other authority construing Executive Order 202.28, and the court’s own research has found only cases concerning the Executive Order that deal with issues not raised by the parties before this court. (*See, e.g., Victoria’s Secret Stores, LLC v. Herald Square Owner LLC*, 2020 WL 2789901 [N.Y.Sup.][Summons with Notice dated May 25, 2020 which reads in part: “Because of the COVID-19 Pandemic, and Governor Cuomo’s ‘New York State on PAUSE’ Executive Order (and related Executive Orders), the lease and guaranty are no longer enforceable under the frustration of purpose doctrine, as well as other common law doctrines and provisions of the lease and guaranty”]; *Elmsford Apartment Assocs., LLC v. Cuomo*, 2020 WL 3498456 [S.D.N.Y. June 29, 2020] [ summary judgment granted to governor in an action brought by landlords alleging that governor’s Executive Order which, *inter alia*, temporarily prohibited landlords from initiating eviction proceedings against tenants who were facing financial hardship due to pandemic violated landlords’ rights under Contracts Clause, Takings Clause, Due Process Clause, and Petition Clause]).

Executive Order 202.28, though not a statute, should be construed in a similar manner. The defendant tenant did not argue “legislative” intent (*see, McKinney’s Statutes* §364; *Perdomo v. Morgenthau*, 60 AD3d 435 [2009]) in an attempt to bring an action for a non-possessory money judgment within the scope of the Executive Order, let alone submit any materials which would support such an argument. Moreover, a Court must interpret unambiguous language in a statute to give effect to its plain meaning ( *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 NY3d 84 [ 2020]). Executive Order 202.28 by its plain terms applies

to evictions, and it does not mention non-possessory money judgments. Though this Court is mindful of the defendant tenant’s difficult circumstances, “[a]bsent ambiguity the courts may not resort to rules of construction to [alter] the scope and application of a statute because no such rule gives the court discretion to declare the intent of the law when the words are unequivocal ” ( *Kuzmich v. 50 Murray St. Acquisition LLC, supra*, 91).

The plaintiff correctly argues that the Executive Order does not apply to the case at bar because it is an action for a non-possessory money judgment based on breach of contract, rather than a proceeding to regain possession of the premises brought pursuant to RPAPL Article 7.

Thus, Local Law 55 bars this action against defendant Mei, but neither Local Law 55 nor Executive Order 202.28 bars this action against the defendant tenant.

Accordingly, the motion is granted as to defendant Mei and the complaint is dismissed as against him. The motion is denied as to defendant Three Brothers.

Dated: 1/13/21

  
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MARGUERITE A. GRAYS  
J.S.C.

