360 W. 55th St., LP v PBQ LLC
2022 NY Slip Op 32869(U)
August 22, 2022
Supreme Court, New York County
Docket Number: Index No. 652979/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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360 WEST 55TH STREET, LP,

Plaintiff,

- v -

PBQ LLC and JEFFREY SHERMAN,

Defendants.

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INDEX NO. 652979/2020

MOTION DATE 10/02/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after due deliberation, defendant Jeffrey Sherman's motion to dismiss the fifth cause of action of the complaint is denied for the reasons set forth hereinbelow.

Background

In this action for breach of commercial lease obligations, defendant Jeffrey Sherman ("Sherman") moves to dismiss the complaint of plaintiff 360 West 55th Street, LP ("Landlord"). Landlord alleges five causes of action against defendants Sherman and PBQ LLC ("PBQ"): breach of lease agreement - failure to pay rent (first cause of action); breach of lease agreement - failure to remove trade fixtures (second cause of action); breach of lease - failure to pay future rent (third cause of action); legal fees and costs (fourth cause of action); and enforcement of guaranty (fifth cause of action). The fifth cause of action is the only one alleged against Sherman, guarantor of the lease between plaintiff and PBQ's predecessor pursuant to an unconditional guaranty to pay all lease obligations of the tenant.

On October 18, 2010, Landlord and PBQ's predecessor, nonparty Sacada LLC, entered into a commercial lease agreement pursuant to which Sacada LLC would pay an agreed-upon rent each month (NYSCEF Doc. No. 14, ¶ 44). The lease was to expire on September 30, 2025 (*id.*, ¶ 42). The lease was assigned to, and assumed by, PBQ by Assignment dated October 15, 2013 (NYSCEF Doc. No. 16).

Sherman executed a personal unconditional guaranty ("Guaranty") of the lease as part of the lease assignment (NYSCEF Doc. No. 18). The Guaranty assured the payment of all rent and any use and occupancy charges and provided that the Guaranty would remain and continue in full force and effect as to any renewal, change, or extension of the lease (*id.*, ¶ A). As stated in the Guaranty, Sherman is fully responsible for PBQ's obligations under the lease: "this guaranty is a primary obligation of Guarantor and not a mere guaranty of collection; that the Landlord shall have the right at the Landlord's discretion to proceed against the Guarantor upon default of the Tenant under the Lease . . . ." (NYSCEF Doc. No. 18 ¶ B.)

PBQ had operated a restaurant/café at the leased property and allegedly failed to make the required rent payments starting September 2018, and continuing thereafter, and allegedly failed to remove trade fixtures upon vacatur of the space in violation of the Lease Rider. Plaintiff alleges that at the point when PBQ vacated the premises on May 31, 2020, it owed $130,670.64 in unpaid rent. Consequently, and of extreme significance for purposes of the within analysis, PBQ's default, and, thus, Sherman's concurrently defaulted guaranty obligation, ***first took root prior*** to any COVID-19 relief period commencing March 7, 2020 (*see*, Affidavit of Sorali Lugo [NYSCEF Doc. No. 11] ¶ 4 ["The amount Defendants owed as of March 1, 2020 was $130,670.64"]). Plaintiff also alleges that PBQ is liable for $75,000 resulting from PBQ's failure to remove trade fixtures as agreed upon in the Lease Rider:

> The tenant shall be liable for the reasonable expenses incurred by the landlord in removing said trade fixtures and other property, and for the reasonable expenses incurred by the landlord in restoring any damage to the premises occasioned by the removal of such trade fixtures or other property and the tenant shall reimburse the landlord for any damage, if any occasioned by such removal.

(Rider to Lease [NYSCEF Doc. No. 14] ¶ 58.)

Sherman personally agreed in the Guaranty to the full performance and observance of all agreements by PBQ in the lease including payment of rent, removing PBQ's trade fixtures, and the payment of legal fees. As a result of the alleged breaches of lease by PBQ, plaintiff asserts that Sherman, as of the date of filing of the complaint on July 8, 2020, is obligated to pay the amount of $205,670.64 (the value of unpaid rent and trade fixture removal cost), ***plus*** the amount of any future rent that comes due through the lease expiration date, and the reasonable value of legal fees.

The restaurant/café was forced to shut down and cease serving patrons under New York State Gubernatorial Executive Order ("EO") No. 202.3 because of the public health concern posed by COVID-19.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id*., at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group*, LLC, 25 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] [internal citations omitted]). "[W]here . . . 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" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Sherman's defense to the allegations of breach of contract, and the basis for his instant motion to dismiss the claim against him, is that he is protected under NYC Administrative Code 22-1005 (the "Guaranty Law"). The Guaranty Law – enacted in connection with COVID-19 circumstances – renders personal liability provisions in commercial leases unenforceable where the guarantor is a natural person and a non-tenant, and provides protection for guarantors from a landlord's pursuit of their assets during a time of economic uncertainty. The law is applicable to guarantors who meet the following conditions:

> 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[; and]
>
> 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.

(NYC Administrative Code 22-1005 [emphasis added].)

It is undisputed that Sherman is a non-tenant who personally guaranteed PBQ's obligations under the lease and that the tenant, PBQ, was required to close and cease serving patrons under Executive Order 202.3, issued by the Governor on March 16, 2020. Sherman's counsel contends that the Guaranty Law protects him from liability for PBQ's alleged breach of lease. However, as clearly stated in that Administrative Code provision, it only applies where the default "causing" the guarantor to be "personally liable for such obligation ***occurred*** between March 7, 2020 and June 30, 2021" (NYC Administrative Code 22-1005 [2] [emphasis added]). According to the plaintiff's rent ledger (NYSCEF Doc. No. 20), submitted and ratified by plaintiff's bookkeeper, Sorali Lugo (NYSCEF Doc. No. 11), PBQ and, thus, Sherman, owed $130,670.64 as of the Guaranty Law's dispensation start date of March 7, 2020.[1]

In one of our court's most thoughtful analyses of the purpose and parameters of the Guaranty Law – *Diamond 47 Nails, Inc. v L'Envie Hair Studio, Inc.* (2022 NY Slip Op 30932 [U], 2022 WL 810243 [Sup Ct NY County Mar. 17, 2022] [Engoron, J.]) – guidance was appropriately derived from the precise language of the Guaranty Law (*see, Majewski v Broadalbin-Perth Central School Dist.*, 91 NY2d 577, 583 [1998] ["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"]). The seminal legislative language providing dispositive guidance here is: "*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" (*Diamond 47 Nails, Inc., supra*, Slip Op at **4 [quoting, with emphasis added therein, NYC Admin Code 22-1005 (2)]). The court in *Diamond*

[1] As plaintiff's affiant more precisely explains, the stated figure includes "some rent payments subsequent to [March 7, 2020], but never did catch up on . . . arrears" (Lugo Aff. ¶ 4). Thus, the stated figure credits PBQ, and Sherman, accordingly.

47 Nails, Inc., supra, observed from that language that the Guaranty Law only exempts personal guarantors if, and only if, the "*initial* default" occurred during the time window "between March 7, 2020 and June 30, 2021" (*id.* [emphasis in original]; *see also, 3rd & 60th Assocs. Sub LLC v Third Ave. M&I, LLC,* 199 AD3d 601, 601 [1st Dept 2021] ["the critical time frame for determining when the protections of Administrative Code section 22-1005 attach is the time of the 'event causing such natural persons to become . . . liable'"], *lv denied* 38 NY3d 912 [2022]).[2] This court adopts the reasoning and holding of the court in *Diamond 47 Nails, Inc., supra*.

Thus, Sherman's motion to dismiss the rental arrears cause of action (alleged in the complaint at $130,670.64), and future rent cause of action, is denied.

As for the cause of action seeking costs from Sherman arising from PBQ's alleged failure to remove trade fixtures (alleged in the complaint at $75,000), plaintiff would have to demonstrate, in the first instance, that such costs are naturally included in amounts guaranteed in the Guaranty, distinct of any attendant Guaranty Law analysis occasioned by the fact that PBQ's failure to remove its fixtures initiated during the Guaranty Law window period – on the vacatur date of May 31, 2020. The Guaranty guarantees the following: "Base Rent, Additional Rent, use and occupancy charges and other sums which shall be payable by the Tenant to the Landlord pursuant to this Lease" (NYSCEF Doc. No. 18 at 1).

Paragraph 58 of the Lease Rider (NYSCEF Doc. No. 14), titled "TRADE FIXTURES," provides:

> IF THE TENANT, AT THE EXPIRATION OF THIS LEASE, SHALL FAIL TO REMOVE ANY TRADE FIXTURES OR OTHER PROPERTY, SAID TRADE FIXTURES AND OTHER PROPERTY SHALL BE DEEMED ABANDONED BY THE TENANT AND SHALL BECOME THE PROPERTY OF THE LANDLORD, AND

[2] The court in *Diamond 47 Nails, Inc., supra,* goes on to discuss whether the protections of the Guaranty Law extend to cover defaulted obligations continuing past June 30, 2021, in instances where it applies to begin with, i.e., a default *initiating* within the window period. However, that discussion is not pertinent here, where the Guaranty Law is held not to apply due to PBQ's pre-window-period default and as further discussed hereinbelow.

> THE TENANT SHALL BE LIABLE FOR THE REASONABLE EXPENSES INCURRED BY THE LANDLORD IN REMOVING SAID TRADE FIXTURES AND OTHER PROPERTY, AND FOR THE REASONABLE EXPENSES INCURRED BY THE LANDLORD IN RESTORING ANY DAMAGE TO THE PREMISES OCCASIONED BY THE REMOVAL OF SUCH TRADE FIXTURES OR OTHER PROPERTY AND THE TENANT SHALL REIMBURSE THE LANDLORD FOR ANY DAMAGE, IF ANY OCCASIONED BY SUCH REMOVAL. . . .

Clearly, then: trade fixture removal costs are among the costs which PBQ, and Sherman as its guarantor, must absorb. But the inquiry is not ended in Sherman's favor merely because the trade fixture removal obligation in this case *initiated* during the Guaranty Law window period – specifically, on PBQ's vacatur date of May 31, 2020. The question here is: does the Guaranty Law apply, at all, to this type of lease-related obligation – situated as it is outside the ordinary realm of "rent" or similar routine lease-related charges? The court concludes that the Guaranty Law will not avail Sherman, on account of a limitation in what it actually was legislated to cover, as revealed by a careful reading of its language (*see*, *Majewski*, *supra*). The Guaranty Law specifically delineates the particular types of guaranteed lease obligations that come within its purview, thus:

> 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: . . . .

(NYC Admin Code 22-1005 [emphasis added].)

The Lease Rider's trade fixture cost obligation of PBQ, imputed to Sherman in the Guaranty, does not come within the legislatively specified categories of "rent," "utility expenses," "taxes," or "fees and charges relating to routine building maintenance." It is an extraordinary expense (albeit lease-related) which the parties were free to agree on – and did

agree on. Thus, by virtue of its own language, the Guaranty Law does not apply to this expense and, therefore, that Law cannot form the basis for dismissal of the trade fixture claim.[3]

Accordingly, it is

ORDERED that the motion to dismiss the fifth cause of action of the complaint is denied; and it is further

ORDERED that defendant Jeffrey Sherman shall serve and file an answer to the complaint within 20 days of the filing of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on September 21, 2022, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

8/22/2022
DATE

LOUIS L. NOCK, J.S.C.

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

[3] Plaintiff has lodged a general challenge to the constitutionality of the Guaranty Law, asserting that the Law violates the Contract Clause of the United States Constitution: "No State shall . . . pass any . . . law impairing the Obligation of Contracts" (US Const, art I, § 10). This court is aware of pending federal litigation which is deliberating on that issue (*see, Melendez v City of N.Y.*, 16 F4th 992 [2d Cir 2021]). That issue is not pertinent to the instant case in light of this court's holding herein that the Guaranty Law does not apply, at all, to Sherman because, as explicated in the text, his rent payment default initiated prior to the Law's window period and the Law does not apply, under any circumstances, to his trade fixture cost default.