SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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WALBER 419 COMPANY LLC, 419 PARK AVENUE SOUTH ASSOCIATES LLC,

Plaintiffs,

- v -

KNOTEL 419 PAS LLC, KNOTEL INC., GRIND LLC, AMOL SARVA, BENJAMIN DYETT,

Defendants.

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INDEX NO. 159494/2020

MOTION DATE 10/04/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

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

Upon the foregoing documents, plaintiffs (collectively referred to as landlord or plaintiff) move for summary judgment on the fifth and tenth causes of action as against defendant Amol Sarva (defendant or Sarva) and dismissing Sarva's affirmative defenses and counterclaim.[1] Sarva cross-moves to dismiss the complaint insofar as asserted against him on grounds that the claims are barred by New York City Administrative Code 22-1005 and for summary judgment on his counterclaim for harassment.

The action arises out of plaintiff's lease dated January 1, 2011, which was modified by a letter agreement dated December 19, 2011 with defaulting defendant Grind, LLC (Grind) with respect to the real property on the 2nd floor in the building located at 419 Park Avenue South,

[1] The branch of the motion seeking leave to enter default judgment against defendant Grind LLC was denied without prejudice by separate interim decision and order dated 10/4/2021 (NYSCEF Doc No 38). That branch of the motion seeking leave to amend the amount of damages was also granted in the same decision and order (*see id.*).

New York, New York 10016 (see NYSCEF Doc No, 1 complaint at ¶¶ 3, 8).[2] Thereafter, the lease and Grind's rights and obligations with respect to the demised premises thereunder were assigned to and assumed by defendant, Knotel 419 PAS LLC ("Tenant"), by agreement dated September 1, 2017 (*id.* at ¶ 9). Defendant Sarva guarantied Tenant's payment and performance of Tenant's obligations under the lease from the time of such assignment by written Guaranty dated October 23, 2018 (*id.* at ¶ 12).

Plaintiff's complaint asserts that Tenant is obligated to the Plaintiff in the sum of $364,409.58 for each of the following charges:

a. Fixed Rent pursuant to Lease Paragraph 38 in the sum of $197,469.77; and
b. Real Estate Tax pursuant to Lease Paragraph 39 in the sum of $28,735.52; and
c. Electricity Charges pursuant to Lease Paragraph 61 in the sum of $18,366.60; and
d. Late Charges pursuant to Lease Paragraph 61 in the sum of $9,696.69; and
e. Replenishment of the security deposit pursuant to Lease Paragraph 44 in the sum of $54,621.00

Plaintiff's second through fifth claims assert that the same amounts are owed by the defendants pursuant to written guaranties; plaintiff also asserts a claim for reasonable attorneys' fees recoverable under the lease in paragraph 19 as additional rent against the Tenant and each of the guarantors.

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrate that no genuine issue of material fact exist. A party seeking summary judgment must make a prima facie case showing that they are entitled to a judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To successfully

[2] Defendant Dyett guarantied payment and performance of Grind's obligations under the leased pursuant to written Guaranty executed on December 17, 2010. (*id.* at ¶ 11). This defendant was dismissed from the action by stipulation dated December 3, 2020 (see NYSCEF Doc No 2). Defendant Knotel is also alleged to have guarantied Tenant's payment and performance of the Lease from the time of such assignment to Tenant. (NYSCEF Doc No 1 at ¶ 13). However, the action against this Knotel entity as well as the Tenant is stayed pursuant to 11 USC § 362. "The automatic bankruptcy stay is generally not extended to non-debtor guarantors" like Sarva (*Empire Erectors & Elec. Co., Inc. v Unlimited Locations LLC*, 102 AD3d 419 [1st Dept 2013]).

oppose a motion for summary judgment, the opposing party must present "'facts sufficient to requires a trial of any issue of fact'" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980], quoting CPLR 3212). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to withstand dismissal (*id.* at 562).

Plaintiff demonstrated its entitlement to summary judgment by establishing the existence of a guarantee and submitted proof by way of an affidavit as to the Tenant's nonpayment of rent and additional rent due under the lease (*see Bank of Am., N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]). Sarva failed to demonstrate an issue of fact requiring trial. Although Sarva asserts that he encountered problems with surrendering before ultimately doing so in January 2021, counsel cites to no legal authority providing a basis for lessening the amount for which Sarva remained responsible on the guaranty due to its *attempts* to surrender as opposed to the actual date of surrender.

The Court rejects defendant's contention that the claims against him are barred because he qualifies under subsection 1 (b) and subsection 2 of New York City Administrative Code § 22-1005 (hereinafter, guarantor law), and also finds that plaintiff met its prima facie burden to dismiss the affirmative defenses and dismiss defendant's counterclaim related to the guarantor law.

The guarantor law states:

> "A provision in a commercial lease or other rental agreement involving real property located within the city that provide 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, 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 2.2.7 issued by the governor on March 19, 2020

2. The default or other event causing such natural persons to become wholly liable or partially liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive."

The Court finds that the Tenant, a company that manages workspace for other companies, is not a non-essential retail establishment within the meaning of the statute and therefore does not qualify under paragraph 1(b) of §22-1005. Consequently, because the Tenant does not qualify under the guarantor law, there is no bar to enforcing the guaranty against Sarva. Additionally, defendant's counterclaim pursuant to §22-902(a)(14) of the Administrative Code, which prohibits landlords from "attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code," is not applicable and shall be dismissed.

Pursuant to CPLR 3211 (b) a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In reviewing such a motion "the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). "If there is any doubt as to the availability of a defense, it should not be dismissed" (*Becker v Elm A.C. Corp.*, 143 AD2d 965, 966 [2d Dept 1988]). CPLR 3013 requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence. Here, the plaintiff moves to dismiss all defenses asserted by defendant.

Plaintiff argues that the defenses are merely conclusory statements of law with no facts or details. The Court agrees that the affirmative defenses are not sufficiently particular pursuant to CPLR 3013 and are otherwise without merit, including the affirmative defense of frustration of purpose and/or impossibility of performance.

An impossibility defense will "excuse a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible" (*Kel Kim Corp v Central Mkts.*, 70 NY2d 900, 902 [1987]). More specifically, it has been held that the defense of impossibility of performance is generally or without merit when asserted by commercial tenants whose defense derives from a COVID-19 related rent nonpayment (*see Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022] [finding that the COVID-19 pandemic did not result in plaintiff's performance impossible]; *RPH Hotels 51st St. Owners, LLC v HJ Parking LLC*, NY Slip Op 30286[U], *5, 2021 NY Misc 373 LEXIS [Sup Ct, NY County 2021] [finding that a decrease in business production due to the COVID-19 pandemic does not enable a defendant to successfully assert that performance was impossible]).

Defendant claims that the nature of Tenant's business frustrated the purpose of the Lease and made its performance impossible because the COVID-19 pandemic forced its members to terminate their memberships. While that may be true, it has been established that a party will not qualify under the doctrine of impossibility due to a loss in business production. profits (*see 55 Broadway Realty LLC v. Houston Upholstery Co., Inc.*, NY Slip Op 32608[U], *3, 2021 NY Misc 6318 LEXIS [Sup Ct, NY County 2021] [finding that a loss of profits is insufficient for a successful impossibility of performance claim]). Although the pandemic was unforeseen and has disproportionately affected its business, plaintiff should not suffer due to

Tenant's loss in business. Accordingly, the doctrine of impossibility is not applicable here and the affirmative defenses are dismissed.

Accordingly, it is hereby ORDERED that defendant Sarva's cross motion is denied in its entirety; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on its fifth cause of action against defendant Sarva is granted and the Clerk of the Court is directed to enter judgment in favor of the plaintiffs against defendant AMOL SARVA in the amount of $ 454,104.52, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the motion seeking leave to enter default judgment against defendant Grind LLC is denied as set forth in the interim decision and order dated 10/4/2021 (NYSCEF Doc No 38) without prejudice and leave to renew within one year from entry of that order (see CPLR 3215 [c]); and it is further

ORDERED that the second and seventh causes of action are severed and may proceed as set forth in the preceding paragraph concerning defendant Grind LLC; and it is further

ORDERED that the first, third, sixth, and eighth causes of action are severed and stayed pursuant to 11 USC § 362; and it is further

ORDERED that the parties shall contact the assigned justice's part[3] for a preliminary conference and/or status when the bankruptcy stay is lifted; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on the tenth cause of action against defendant AMOL SARVA for the recovery of attorney's fees is granted to the extent that the claim is severed and the issue of the amount of reasonable attorney's fees

[3] This matter is currently assigned to the Hon. Mary V. Rosado, presiding over Part 33.

that plaintiff may recover against the defendant SARVA is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J).[4]

This constitutes the decision and order of the Court.

8/12/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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

[1] The Information Sheet is accessible under the "References" page on the court's website: www.nycourts.gov/supctmanh.

[4] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.