SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

----------X

201 EAST 10TH STREET LLC

Plaintiff,

- v -

FRANCIS GARCIA,

Defendant.

----------X

INDEX NO. 653239/2020

MOTION DATE 02/09/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for RENEWAL.

In July 2020, plaintiff 201 E 10th Street LLC commenced this action by notice of motion for summary judgment in lieu of a complaint under CPLR 3213 against defendant Francis Garcia. Plaintiff's motion papers alleged that defendant, as the guarantor of a commercial lease between LTS East LLC and plaintiff, owes $2,694,239.50,[1] the amount on the remaining lease term including various state and local taxes after LTS East defaulted. Defendant cross-moved to dismiss the action based on NYC Admin. Code §22-902 (a) (14), which prohibits certain actions considered landlord harassment. On November 17, 2020, another justice of this court denied both parties' underlying motion on the record. (*201 E 10th Street LLC v Francis Garcia*, Index No. 653239/2020, Mot. Seq. 001, NYSCEF doc. no. 34 [Sup Ct, NY County 2020].) With respect to plaintiff's motion, the court recognized that one of defendant's arguments in opposition to summary judgment appeared to be implicated by a constitutional challenge to New York City's pandemic-era "Guarantor Law" (NYC Administrative Code 22-1005) that was then-pending in the U.S. District Court for the Southern District of New York (SDNY). (*Melendez v City of NY*, 503 F Supp 3d 13 [SDNY 2020].) The Second Circuit, however, has since reversed and remanded the relevant portion of the district court's decision. (*See Melendez v City of NY*, 16 F4th 992 [2d Cir. 2021].)

Here, in Mot. Seq. 002, plaintiff moves pursuant to CPLR 2221 (e) for leave to renew the court's denial of its motion for summary judgment in lieu of a complaint. It argues that the aforementioned Second Circuit decision constitutes a change in the law that would have changed the court's determination on the prior motion. On renewal, plaintiff argues that it is entitled to summary judgment in the amount of $696,574.65, representing rent due through January 2021, monthly property taxes, and liquidated damages. Defendant opposes the motion in its entirety.

[1] Plaintiff no longer seeks this amount given that LTS East invoked the lease's liquidated damages clause and plaintiff re-leased the premise to another tenant.

For the following reasons, plaintiff's motion for leave to renew is denied. The Court adheres to the November 2020 Decision denying plaintiff summary judgment.

BACKGROUND

On August 15, 2019, plaintiff executed both a commercial lease agreement with LTS East LLC and a separate guaranty agreement with defendant Francis Garcia. The lease commenced on that date and established rent at $16,000 per month, running for a lease term of twelve years. (NYSCEF doc. no. 7, lease agreement.) At that time, LTS East owned and operated "Lions & Tigers & Squares Detroit Pizza" (Lions & Tigers) at 160 2nd Avenue, New York, New York (the premise). The guaranty agreement, signed contemporaneously, provided that defendant would be liable for "the full and timely payment, performance, and observance of, and compliance with all of Tenant's obligations under the Lease, including, without limitation, the full and prompt payment of all fixed annual rent, Additional Rent and all other charges and sums due and payable by Tenant." (NYSCEF doc. no. 5, guaranty agreement.) It further stated, "[t]his is an absolute and unconditional guaranty of payment and performance." (*Id.*)

In early March 2020, the COVID-19 pandemic hit New York City creating a public health emergency. In response, the state legislature granted then-Governor Andrew Cuomo broad authority to "issue any directive during a state disaster emergency" that he deemed "necessary to cope with the disaster," and expanded his existing authority to temporarily suspend "any statute, local law ordinance, or orders, rules or regulations. (N.Y. Exec. Law art. 2-B, §29-a [2020].) On March 7, as part of his expanded authority, Governor Cuomo issued Executive Order No. 202, which declared a state of emergency in New York. Later, on March 16, he issued Executive Order No. 202.3, which prohibited, *inter alia*, bars and restaurants from serving food and beverages on their premises as well as closed certain non-essential businesses such as gyms and movie theaters. Such executive orders directly impacted restaurants such as Lions & Tigers, many of which lost revenue critical to their continued operation. As defendant attests, after New York limited in-person dining, Lions & Tigers relied exclusively on delivery and take-out orders to meet its financial obligations. (*See* NYSCEF doc. no. 13 at ¶11, def. affidavit.)

In addition to various public-health measures taken at the state-level,[2] the New York City Council passed Local Law No. 55-2020, entitled "Personal Liability Provision in Commercial Leases" or the "Guaranty Law." (*See* Admin. Law §22-1005.) Effective May 26, 2020, the statute provides that, where a natural person who is not the tenant would otherwise become wholly or partially liable for the tenant's default under a guaranty agreement, that agreement shall not be enforceable if: (1) (a) the tenant was required to cease serving food or beverage for on-premises consumption under Executive Order 202.3, and (2) the default causing such natural persons to become liable occurred between March 7, 2020, and June 30, 2021.[3] (*Id.*) The statute

[2] These measures include moratoriums on evictions and foreclosures, financial relief allowing tenants to use security deposits to pay rent, and residential rent relief programs for those experiencing hardships due to COVID-19. For a fuller picture as to New York State's pandemic response, see *Melendez v City of N.Y.* (503 F Supp 3d 13, 19-21 [S.D.N.Y 2021].)

[3] Several aspects of the law are worth noting here. First, the statute applied retroactively to March 7, 2020, covering LTS East's default in April 2020 onward. Second, the statute that passed in May was initially only effective through September 28, 2020. Given the continued threat the pandemic posed, the City Legislature subsequently amended it

covers liability for payments of rent, utility expenses, and taxes owed under such agreements.[4] As the Second Circuit more succinctly described it, the statute renders personal liability guaranties on commercial leases that meet these two requirements unenforceable. (*See Melendez.*, 16 F 4th at 1005.)

Melendez described the purpose of the statute at length.[5] Concerned with the continued difficulty of running small businesses and believing the state-wide measures did not go far enough to protect them, the City Legislature enacted the statute, in the words of Council Member Carlina Rivera, to "ensure [that] city business owners don't face the loss of their business and personal financial ruin or bankruptcy as a result of this state emergency." (*Id.* at 1006.) Not only did the law seek to shield from liability personal guarantors who might face financial ruin if forced to cover debts with life savings and personal assets, the Legislature, by all accounts, appears to have enacted the statute with an eye toward the city's future well-being after the pandemic's end. The *Melendez* court explained this purpose in terms of the Legislature's "neighborhood-preserving" interest. (*Id.* at 1043.) It sought to "ensure that business owners, should they be forced to walk away or temporarily shutter their stores, through no fault of their own, can do so without facing personal liability, *ensuring that one day they may be able to return and relaunch or create a new thriving business in our neighborhoods.*" (emphasis added) (*Id.*)

Perhaps, by focusing on this aspect of the law, the *Melendez* court undersold its broad purpose. Council members were not just focused on functioning neighborhoods after shut-down orders had been lifted: they were focused on the hundreds of thousands of workers who, in the interim, would lose their jobs and who would face difficulties returning to work should those who own the businesses face personal liability. (*Melendez*, 16 F 4th at 1059-1060 [Carney, J., dissenting] [citing City Council Speaker Corey Johnson as co-sponsor of the law].) In the accompanying "Declaration of legislative intent and findings," the City Council explicitly connected the suffering of business owners to the wider economy. It found that the city lost 151,000 jobs in the food service industry from February 2020 to July 2020 and that "the economic and social damage caused to the city will be greatly exacerbated and will be significantly worse" without the Guaranty Law. (*See* NYC Admin. Code 22-1005.) In short, the statute was broadly focused on minimizing the potentially devastating effects that the pandemic might wreak on the city's entire economy should small businesses fail on the scale that was, at that time, entirely conceivable.

Plaintiff's First Summary Judgment Motion

In April 2020, several weeks after Governor Cuomo issued Executive Orders 202 and 202.3, LTS East stopped paying rent. In early July 2020, it permanently shuttered Lions & Tigers; on July 15, 2020, it abandoned the premise (NYSCEF doc. no. 3, Rothken aff); and on July 19, 2000, it voluntarily dissolved. (NYSCEF doc. no. 40, N.Y. Dep. of State records.) Thereafter, on July 20, 2020, plaintiff commenced this action with a notice of motion in lieu of a

---

to be effective through June 2021. Lastly, under the statute, should tenant default during the relevant period, the guarantor's obligation is extinguished for the *entire* lease term, not just for liabilities arising during that period.

[4] The law does not refer to brokerage fees that may apply by way of any guaranty agreement.

[5] The Court discusses the significance of *Melendez* to the instant motion more fully *infra*.

complaint against defendant seeking back rent owed through July, all future rent owed through the end of the lease term, and various taxes and fees. (NYSCEF doc. no. 2, notice of motion.)

Defendant opposed the motion in lieu of a complaint on several grounds, including (1) Executive Order 202.3 either rendered LTS East's performance on the underlying lease impossible or frustrated LTS East's purpose; (2) the guaranty agreement is not an instrument under which plaintiff may move for summary judgment under CPLR 3213, i.e., the guaranty agreement is not an "instrument for the payment of money only;" and (3) relatedly, a CPLR 3213 summary judgment motion is not the proper vehicle for summary judgment because proof of defendant's liability requires documents outside the guaranty agreement itself. (NYSCEF doc. no. 24, def. memo of law in mot. seq. 001.) Most critically for purposes of the instant motion to renew, defendant argued that he met the two requirements under the Guarantor Law—that LTS East was affected by in-person dining restrictions and shuttered its business during the relevant period—that would make the guaranty agreement unenforceable against him. (*Id.*) Further, defendant cross-moved for summary judgment, arguing that plaintiff violated New York City Administrative Code § 22-902 (a) (14) by attempting to enforce a personal liability provision it knew to be unenforceable under the Guarantor Law.

On November 17, 2020, the court heard oral arguments on the record, focusing on the constitutionality of the Guaranty Law. Specifically, at issue was whether the law—by interfering with the enforceability of guaranty contracts for upwards of sixteen months—impermissibly impaired the obligations of contracts in violation of the U.S. Constitution's Contracts Clause. (U.S. Const. art. I, § 10, cl.1.) During arguments, the court recognized the overlapping issues between the motions before it and the motion to dismiss in *Melendez* that was *sub judice* in SDNY. While it ultimately denied both parties' summary judgment motions, the court did not make any substantive determination as to the constitutionality of the Guarantor Law, concluding only that "there were certainly grounds to believe that the tenant and the guarantor are on the hook." (*201 E 10th Street LLC v Francis Garcia*, Index No. 653239/2020, Mot. Seq. 001, NYSCEF doc. no. 34, Nov. 11, 2020; NYSCEF doc. no. 43, oral arg. transcript.)

Plaintiff's Motion for Leave to Renew

Both the district court and the Second Circuit issued decisions in *Melendez* since the November 2020 decision. Plaintiff bases its motion to renew on the latter's decision. In plaintiff's understanding, the Second Circuit determined, or likely determined, the Guarantor Law is unconstitutional under the Contracts Clause. If so, under CPLR 2221 (e), the decision would constitute (1) a change or clarification in the law that (2) changes the court's prior determination. (NYSCEF doc. no. 37, plaintiff memo. of law in support.)

In opposition, defendant re-raises the arguments it made on the original motion.[6] (The court's underlying decision did not directly address these arguments.) As to *Melendez*, defendant asserts that the Second Circuit's opinion did not change or clarify the issue of whether the

[6] To briefly recapitulate, the arguments include: (1) LTS is not liable under the doctrines of impossibility and frustration of purpose; (2) CPLR 3213 requires the agreement to be for "money only", but the agreement here imposes other obligations; and (3) defendant's liability must be proven through extrinsic evidence, again, making CPLR 3213 an improper method for summary judgment.

Guarantor Law is constitutional. While it may have reversed the district court, the Second Circuit only remanded the issue for further proceedings. In essence, it provided the district court with guidance regarding how it should analyze the law going forward with respect to the applicable standard under the Contract Clause. (NYSCEF doc. no. 49, def. memo of law.) From this perspective, within federal courts, the law's constitutionality is still an open question, as it was on the original motion. With the status quo unchanged, defendant argues there is no basis for this Court to determine plaintiff's summary judgment motion any differently than it did before.[7] (*Id.*)

Further, defendant suggests that the Court should definitively hold that the statute *is* constitutional, as other justices have. (*See 45-47-49 Eighth Ave. LLC v Joseph Conti*, 2021 NY Slip Op 50691 [U] [Sup Ct, NY County 2021] [Lebovits, J.] [holding that the Guaranty Law was an appropriate and reasonable means to achieve a legitimate public purpose]; *204 East 38th LLC v Sons of Thunder LLC*, 2020 NY Slip Op 33862[U] [Sup Ct, NY County 2020] [Bluth, J.] [holding that the statute is not unreasonable or inappropriate given the "dire financial situations due to mandated closures and restrictions"]; (*Fifty E. Forty Second Co. LLC v Noy LLC*, 2021 NY Slip Op 31681[U] [Sup Ct, NY County 2021] [Kotler, J.][8].)

DISCUSSION

CPLR 2221 (e) provides a motion to renew must be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (*See* CPLR 221 [e] [2].) Where the basis for a motion to renew is a change in the law, the change must be actual and definite. (*Compare Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272-273 [1st Dept 2003] [concluding that the Court of Appeals' resolution of a conflict between Appellate Divisions against the First Department changed the law the motion court relied upon and therefore constituted proper grounds to grant motion to renew] *and Matter of Martin v City of NY*, 103 AD3d 412, 412 [1st Dept 2013] [concluding that the lower court properly granted a motion to renew where the First Department in a similar case invalidated the legal basis for the challenged agency determination but only after the original motion had been decided], *with Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 6-7 [1st Dept 2014] [holding that a decision which merely restates, adds clarity, or makes explicit principles already found in existing law—instead of changing it—cannot form the basis of a renewal motion].) Moreover, a development in the case law of other courts—law that is merely persuasive and not binding—*may* be considered a "change in the law" if the motion court cites to, and relies on, a subsequently reversed decision. (*Matter of City of NY v NY State Pub. Empl. Relations Bd.*, 103 AD3d 145, 151-152 [3d Dept 2012].)

Under CPLR 3213, a plaintiff may serve with the summons a notice of motion for summary judgment in lieu of a complaint "when an action is based upon an instrument for the

[7] As discussed below, defendant argues the law is constitutional. Should the Court decline to rule in its favor on this issue, defendant requests that, instead of granting plaintiff's motion, the Court stay the current motion pending the district court's determinations on remand.

[8] The Second Circuit issued its opinion *after* each of these cases. Only Justice Kotler's Decision and Order even reflected a consideration of the district court's opinion in *Melendez*. The other two were decided on motions prior to the district court's opinion. However, Justice Lebovits, in *Conti*, considered the Second Circuit's opinion on a landlord's motion to renew and denied the motion. (Index No. 654033/2020, NYSCEF doc. no. 67.)

payment of money only." (*See* CPLR 3213.) The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006].) Once that showing is made, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) A summary judgment motion should be denied where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

Plaintiff's Motion for Summary Judgment in Lieu of a Complaint under CPLR 3213

Defendant does not deny that LTS East's lease with plaintiff required it to pay $16,000 per month in rent for a lease term of twelve years (NYSCEF doc. no. 7); that the lease specifically names him as a guarantor of LTS East's obligations (*id.*); and that the guaranty agreement he signed guarantees plaintiff "the full and timely payment, performance and observance of, and compliance with all of Tenant's obligations under the Lease, including…the full and prompt payment of all fixed rent, Additional Rent and all other charges and sums due payable." (NYSCEF doc. no. 5.) Moreover, plaintiff has demonstrated that LTS East defaulted as defined by Section 18.1 of the lease from April 2020 onward.

Ordinarily, on a CPLR 3212 motion, having submitted such proof, plaintiff would have made a *prima facie* showing of entitlement to the rent and fees owed. (*See Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276, 277-278 [1st Dept 2006] [affirming lower court's finding of liability where a plaintiff submitted proof in admissible form of a valid lease and unpaid rent]; *138 N.Y. Realty v Conroy*, NYLJ Aug. 6, 2019, at 7-8 [Sup Ct. NY County 2019] [finding liability where documents clearly and unambiguously require payment of rent in the event of defendant's default].) Here, however, plaintiff has moved via CPLR 3213, which requires the movant produce "an instrument for the payment of money only," and defendant argues that the guaranty agreement requires LTS East's performance of additional obligations other than merely paying rent. (NYSCEF doc. no. 49 at 10.)

Defendant argues that the guaranty agreement makes him liable for all of LTS East's obligations, which, in his view, are numerous and cover a wide range of issues regarding how the premise is to be used. The lease mandates, for example, the premise be used as a restaurant only, that it will be operated in a manner that does not offend the community, and that it will not be used in the handling of hazardous materials. (*See* NYSCEF doc. no. 7, lease articles 3 and 4.) Defendant contends that the lease requires performance in addition to payment of money and therefore plaintiff cannot obtain relief through CPLR 3213. While defendant is correct that an agreement guaranteeing both payment and performance does not qualify as an instrument for the payment of money only (*Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520, 522 [1st Dept 2020]), defendant's guaranty agreement contains an absolute and unconditional guaranty of payment clause. (NYSCEF doc. no. 5 at ¶3). Guaranty agreements that contain such clauses qualify under CPLR 3213 as an instrument for money only because such clauses remove

condition precedents and additional performance by landlord before payment becomes obligated. (*See Ipayment, Inc. v Silverman*, 192 AD3d 586 [1st Dept 2021].)[9] Accordingly, this argument does not preclude summary judgment.

Relatedly, defendant contends that plaintiff may not obtain summary judgment through CPLR 3213 because documents other than the guaranty itself (or other simple proof) is required to determine liability. This is also without merit. Defendant relies on *Weissman v Sinorm Deli, Inc* (88 NY2d 437, 444 [1996]) for the proposition that CPLR 3213 is foreclosed procedurally if "the liabilities and obligations can only be ascertained by resorting to evidence outside the instrument," or "if more than simply proof of nonpayment or a de minimis deviation from the face of the document is involved." Defendant contends that plaintiff's damages must be proven through evidence contained in New York City tax document, brokerage agreements, the current tenant's lease, and attorney invoices for their legal fees—all of which, he asserts, constitutes a substantial deviation from the face of guaranty agreement.

The Court disagrees. While calculating the precise amount in damages that defendant owes requires looking to documents outside the guaranty agreement, this in no way precludes CPLR 3213 as a procedural method because the types of damages that plaintiff seeks—rent owed, additional rent, city taxes, brokerage fees, and attorney's fees—are all specified in the guaranty agreement itself. (*Compare Punch Fashion*, 180 AD3d at 522 [holding that neither looking to a factoring agreement, nor to the company's books and records to determine the amount owed precluded use of CPLR 3213] *with Weissman*, 88 NY2d at 445-446 [finding CLPR 3213 could not be used where an indemnification agreement contained a clause insufficiently detailed to identify the parties' obligations in the first instance].) The guaranty agreement here describes the type of obligations owed by the parties more precisely than the agreement in *Weissman* and is no more complicated than the guaranty agreements in *Punch Fashion*. The Court finds that looking to the documents plaintiff submitted to establish damages does not require more than a "de minimis deviation from the face of the [agreement]." Because a prima facie case has been made out simply from defendant's failure to make payments called for by the agreement itself (*Weissman*, 88 NY2d at 444, quoting *Interman Indus. Prods., Ltd. v R. S. M. Electron Power, Inc.*, 37 NY2d 151 [1975]), use of CPLR 3213 is proper.

Defendant's Impossibility and Frustration of Purpose Defenses

Defendant argues that New York's COVID-19 restrictions, specifically Executive Order 202.3 that restricted in-door dining, made operating Lions & Tigers impossible. He also argues that the restrictions implemented in the city frustrated the purpose for which LTS East entered the commercial lease, i.e., to operate Lions & Tigers. Defendants contends that either the doctrine of impossibility or frustration of purpose excuses LTS East's obligations arising from the underlying commercial lease, and therefore his obligations on the guaranty agreement.

[9] At first glance, *Punch Fashion* can be used in support of defendant's position. The First Department found that one contract therein did not fall within CPLR 3213's money only requirement. However, this contract did not have an unconditional-obligation clause, whereas the second contract consider therein—the one with such a clause—was an instrument for money only. (*Punch Fashion*, 180 AD3d at 522.)

The Court finds that neither doctrine is availing. With respect to the impossibility of operating the restaurant, the Court of Appeals has held that "impossibility excuses a party's performance only when the destruction of the *subject matter of the contract* or means of performance makes performance objectively impossible." (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987].) Here, the subject matter of the contract—the leased premise itself, not the operation of the restaurant—was not affected by either the state or the city's COVID-19 response. Throughout the pandemic, LTS East could have, had it so chosen, remained in possession of the premise and operated Lions & Tigers in accordance with take-out and delivery regulations. The restrictions imposed economic hardship on Lions & Tigers certainly, but difficulty meeting financial obligations does not implicate the doctrine of impossibility. (*See Urban Archaeology Ltd v 207 E. 57th St. LLC*, 68 AD3d 562 [1st Dept 2009], citing *407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]; *1140 Broadway LLC v. Bold Food LLC*, 2020 NY Slip Op 34017 [Sup Ct, NY County 2020] [holding doctrine inapplicable even though pandemic unfortunately devastated a tenant's business and industry].) As the COVID-19 restrictions did not interfere with LTS East's occupation of the premise, the doctrine is not applicable here. ([*See 558 Seventh Ave Corp. v Times Sq. Photo*, 194 AD3d 561, 561-562 [1st Dept 2021] [rejecting the defense of impossibility where tenant, an electronics store, was ordered to shut down, eventually reopened, but never lost access to the premise].)

To invoke the frustration-of-purpose doctrine, defendant must establish a change in circumstances that made plaintiff's performance—providing the premise for occupation—*virtually worthless* to LTS East, thereby frustrating its purpose in making the contract. (*See PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [1st Dept 2011].) There are two problems with this argument. First, the executive orders did not require LTS East to completely cease operation, nor did they prevent LTS East from using the premise as a restaurant. Even when the pandemic was at its worst, LTS East's purpose had not been frustrated. (*Times Sq. Photo*, 194 AD3d at 561.) Second, the restrictions at issue were limited in duration. LTS East entered into the commercial lease for twelve years; the restrictions, no matter how dire their consequences, did not render what would be the remaining ten years on the lease virtually worthless to LTS East. (*See BKNY1, Inc. v 132 Capulet Holdings, LLC*, 2020 NY Slip Op 33144[U] at *3-4 [Sup Ct, Kings County 2020]; (*45-47-49 Eighth Ave. LLC v Conti*, 2021 NY Slip Op 50691[U] at *3 [Sup Ct, NY County 2021].) Consequently, neither doctrine relieves LTS East of liability on the underlying lease.

Whether the Guaranty Law Relieves Defendant of Personal Liability

Discussed *supra*, Administrative Code §22-1005 makes unenforceable personal guaranty agreements on commercial leases if Executive Order 202.3 limited the tenant's ability to serve on-premise food and beverages and the underlying default occurred between March 7, 2020, and June 30, 2021. Here, parties do not dispute that LTS East operated Lions & Tiger, which was subject to Executive Order 202.3 and its default occurred in April 2020. These facts demonstrate *prima facie* that §22-1005 is applicable here and that the guaranty agreement is not enforceable against defendant. Numerous other justices of this court have granted motions for summary judgment in favor of tenants who have argued that the Guarantor Law makes unenforceable the type of agreement at issue here. (*See 45-47-49 Eighth Ave. LLC v Joseph Conti*, 2021 NY Slip Op 50691 [U] [Sup Ct, NY County 2021] [Lebovits, J.]; *204 East 38th LLC v Sons of Thunder*

LLC, 2020 NY Slip Op 33862[U] [Sup Ct, NY County 2020] [Bluth, J.]; (*Fifty E. Forty Second Co. LLC v Noy LLC*, 2021 NY Slip Op 31681[U] [Sup Ct, NY County 2021] [Kotler, J.].) The result is that back rent, future rent, utility expenses and taxes owed under the guaranty are presumptively unenforceable against defendant.

Plaintiff does not dispute that, on its face, the Guarantor Law applies to the agreement here. Instead, it argues that the law is an unconstitutional infringement of its contractual rights as guaranteed by the Contracts Clause of the United States Constitution. As plaintiff cites the Second Circuit's decision in *Melendez* (16 F4th 992 [2d Cir. 2021]) in support of its motion to renew, a review of the decision is warranted.

The District Court's Opinion in Melendez

In *Melendez*, a consolidated action brought by three landlords that challenged, *inter alia*, the Guarantor Law's constitutionality, the District Court for the Southern District of New York granted the defendants' Fed. Rule Civ Pro 12 (b) (6) motion to dismiss. The Court analyzed the Contract Clause challenge under the test the Supreme Court laid out in *Energy Reserves Group v Kansas Power & Light Co.* (459 US 400 [1983]). The test asks whether the contractual impairment is (1) substantial; (2) if it is, whether the law serves a legitimate public purpose; and (3) whether the means chosen to accomplish the legitimate purpose are reasonable and necessary.[10] (*Id.*) The district court determined that, while the Guarantor Law imposed a substantial impairment on landlord contract rights by hindering an important inducement landlords rely upon when entering the commercial lease, the Guarantor Law nonetheless satisfied the remaining two prongs.

With respect to the law's legitimate public purpose, the district court found the city passed the Guarantor Law to benefit the public interest, not to provide benefits to special interest groups.[11]This determination, the court concluded, required it to afford New York policymakers "substantial deference" on the third prong, the law's necessity and reasonableness. (*Melendez*, 503 F Supp 3d at 32.) This deference, in its view, aligned with Supreme Court cases in *United States Trust Co. v New Jersey* (431 U.S. 1, 23 [1977] ["As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure]) and *Energy Reserves Group* (459 U.S. 400, 418 [1983] ["Nor are the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas Legislature's judgment is entitled"].) Moreover, the district court found that deference is especially warranted where the state or city has enacted the law in question to address social and economic emergencies.[12] It recognized that in *Buffalo Teachers*

[10] The Supreme Court in *Home Bldg.& Loan Asso. v Blaisdell* (290 US 398 [1934]) first articulated the principles that would become the test in *Energy Reserves Group. Blaisdell* describes the question facing courts as one that asks "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." (*Id.* at 428.)

[11] *Sanitation & Recycling Indus. v City of N.Y.* defined a law that benefits the public interest to be one that is "aimed at remedying an important 'general social or economic problem' rather than 'providing a benefit to special interests.' (107 F3d 985, 993 [2d Cir. 1997].)

[12] As the Second Circuit's detailed history of the Contract Clause demonstrated, the district court's analysis on the powers granted to states in emergencies could have relied on *Blaisdell* (290 US 398 [1934]), the first Supreme Court case to recognize that an emergency—there, the Great Depression—justified the impairment of contractual

Fed'n v Tobe (464 F3d 362 [2d Cir. 2006]), the Second Circuit held a public benefit corporation's imposition of a wage-freeze necessary and reasonable in light of the fact "no one questions the existence of a very real fiscal emergency." Critically, though the court in *Buffalo Teachers* applied "less deference scrutiny," it did so only because the wage-freeze could be interpreted as the legislature acting self-servingly—a motive that has not been implicated in the passing of the Guarantor Law. (*Id.* at 373.) The district court contrasted the existence of a demonstrable fiscal crisis in *Buffalo Teachers* with the circumstances in *Association of Surrogates Supreme Court Reporters v New York* (940 F2d 766 [2d Cir. 1991], where parties did not assert an emergency and the court *assumed arguendo* that the public purpose was important. (*Surrogates*, 940 F2d at 773.) Based on the deference afforded to state and city legislatures in ongoing emergencies, the court determined that the law satisfied the "necessary" aspect of the third prong. *Melendez*, 503 F Supp 3d at 34.)

The district court then assessed the Guarantor Law's reasonableness by looking to how the city council tailored it. In contrast to *WB Worthen Co. v Thomas* (292 U.S. 426 [1934]), wherein the Supreme Court found a state law unconstitutional because the law "contain[ed] no limitation as to time, amount, circumstances or need (*id.* at 434)," the district court found that the Guarantor Law was more narrowly tailored. First, the law applied only to a subset of guaranty agreements. Not only does the law exclude those agreements that were unaffected by Executive Order 202.3's restrictions or where the tenant defaulted outside the window from March 7, 2020, to June 30, 2021, but it did does apply to guaranty agreements made by the tenants themselves or corporate entities. (*Melendez*, F Supp3d at 36.) Second, the law is temporally limited, i.e., applies only to those agreements, as mentioned above, where tenant defaults from March 7, 2020, to June 30, 2021. (*Id.*) Third, the district court found that the law does not extinguish a landlord's rights under the commercial leases; though more difficult, they remain free to recover unpaid rent from the tenants on the underlying leases. (*Id.*) The district court concluded that the Guaranty Law is reasonable in light of its legitimate public purpose. While the district court recognized the rather significant harm the Guaranty Law imposed on landlords, it nonetheless concluded the landlord-plaintiffs had failed to plausibly plead a Contract Clause violation. It therefore denied them injunctive and declaratory relief and dismissed their complaint.

Second Circuit's Melendez Decision

On appeal, the Second Circuit reviewed the district court's judgment *de novo* and concluded that the plaintiffs *had* stated a plausible Contract Clause challenge. Discussed in further detail *infra*, it found that the record before the district court raised five serious concerns about the law being a reasonable and appropriate means to pursue the professed public purpose. (*Melendez*, 16 F 4th at 1047.) Accordingly, the court reversed the district court's dismissal of the plaintiffs' complaint, vacated the denial of their motion for preliminary injunctive and declaratory relief, and remanded for further proceedings.

---

relationships in service of the state's broad right to protect the lives, health, comfort and general welfare of its citizens. (Id. at 437.) The Supreme Court in *Blaisdell* found that the legislature had an adequate basis to declare the existence of an emergency and that the economic emergency which threatened the widespread loss of homeownership was a "potent cause" for the enactment of the challenged statute. The Court wrote, "it cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake." (*Blaisdell*, 290 US at 439)

The Second Circuit began its discussion by tracing the evolution of the Supreme Court's treatment of challenges to public laws under the Contract Clause. From an early 19th century, strictly textualist view of the clause, which pointed out that the language "No State shall…pass any…Law impairing the Obligation of Contracts" (U.S. Const., Art. I, §10) appears unambiguously absolute, the Supreme Court's interpretation of the clause transformed into the view expounded in the Court's New Deal era case *Blaisdell*. The decision established the principle that where a state's use of power to "safeguard the vital interest of [their] people" conflicts with, or imposes restrictions on, private contractual rights, the state's use of power will be upheld where the state can show "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." (*Id.* at 428.) *Blaisdell* then listed five factors addressing when a law will be upheld against a constitutional challenge, which the Court later summarized as: "First, the state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed. Second, the state law was enacted to protect a basic societal interest, not a favored group. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Fourth, the imposed conditions were reasonable. And, finally, the legislation was limited to the duration of the emergency." (*Allied Structural Steel Co. v Spannaus*, 438 U.S. 234, 242 [1978], citing *Blaisdell*, 290 U.S. at 444-447.)

Melendez moved on to describe what it considered a third phase in the clause's evolution, one in which subsequent courts tried to refine the contours or limits of state power used in ways that impair contracts. It reviewed *United States Tr. Co. v New Jersey* (431 U.S. 1 [1977], *Allied Structural Steel*, and *Pension Benefit Guar. Corp. v R.A. Gray & Co.* (467 U.S. 717 [1984]). From these cases, particularly *Allied Structural Steel*, the Second Circuit understood the Supreme Court to be distancing itself from a line of cases that had gradually weakened the substantive protections of the clause. It emphasized that the purpose of *Allied Structural Steel* was to ensure the "continued vitality of the Contracts Clause" for claims involving private contract.[13] The court summarized the principles from these cases that it would apply to its analysis of the Guarantor Law. It wrote:

> "the standard [judging a law's reasonableness and appropriateness] is more demanding than the rational basis review…*But it is more deferential to legislative judgment than strict scrutiny, particularly when the impaired contract at issue is private and state self-interest is not an obvious concern.* It is a standard that depends on balancing to ensure that the Contracts Clause limitations both 'do not destroy the reserved power' of the states…and that the reserved power of the states does not 'destroy the limitations' of the contracts clause." (emphasis added) (*Melendez*, 16 F4th at 1032.)

[13] As the *Melendez* dissent notes, in *Energy Reserves Group*, decided six years after *Allied Structural Steel*, the Court rejected a Contract Clause challenge, and in doing so, incorporated language regarding the Court's deference to the legislature's judgment concerning the law's necessity and appropriateness. The dissent argued that, to the degree that *Allied Structural Steel* constitutes a shift in Contracts Clause jurisprudence, that shift was not adopted in *Energy Reserve Group* and, as a result, that the majority's analysis seemingly discarded the appropriate deference given to legislatures. (*Melendez*, 16 F4th at 1053.)

In its analysis of the Guaranty Law, the Second Circuit held that five features of the Guaranty Law precluded granting defendants' Rule 12 (b) (6) motion to dismiss. First, the Guaranty Law permanently extinguishes obligations on guaranty agreements in contrast to the temporary or limited impairments, i.e., moratoriums, that *Blaisdell* found reasonable. (*Id.* at 1039-1040.) Second, in addressing problems facing small businesses, the court found problematic that the law was not tailored to those guarantors owning business or, if they did, to those who intended to reopen businesses. At this point, the Second Circuit explicitly rejected deference to legislative judgment, writing it was not warranted "in the absence of some record basis to link purpose and means that, otherwise appears missing." (*Id.* at 1040-1042.) Third, the Guaranty Law allocates the economic burden solely on landlords, not on the city itself or on taxpayers by raising taxes or appropriating money to relieve the burden on landlords. Fourth, the court faults the law for not conditioning relief on need, instead applying to all small businesses that meet the law's qualifications regardless of whether the small businesses and their guarantors might be better able to bear the burden than either a particular landlord or commercial landlords as a class. (*Id.* at 1044-1045) Fifth, it concluded that the reasonableness of the law is called into question by the law's failure to provide landlords to be compensated for damages or losses sustained. (*Id.* at 1045-1046.)

While explaining the five features "weighing heavily" against the law's reasonableness preclude granting defendants' motion to dismiss, the Second Circuit's decision made explicit what it was deciding. It rejected the idea that its holding determined the Guaranty Law to be unconstitutional. (*Id.* at 1046-1047.) Throughout, the Second Circuit is quick to note that, on remand, the record should be more fully developed on certain issues. (*Id.* at 1037 [the record "would benefit from further development" as to the question of the law's legitimate public purpose]; *id.* at 1041 ["Defendants may be able to offer evidence on remand demonstrating missing link between purpose and means"]; *id* at 1046 ["on remand, the parties may, of course, identify still other circumstances relevant to determining whether the Guaranty Law is reasonable and appropriate."]) The dissent similarly interpreted the majority opinion to be confined to whether the district court erred in granting dismissal, not, in his words, "predetermin[ing] that plaintiff has a likelihood of success on the merits." (*Id.* at 1069.)

Applicability of Melendez *to the Instant Motion to Renew*

Under the CPLR 2221 (e), the movant must show that there has been a change in the law that would have changed the prior determination. From the Court's perspective, there are three reasons why plaintiff has not met its burden here. First, as both the majority and dissenting opinions make explicitly clear, the Second Circuit did not find the Guaranty Law to be unconstitutional. While the court may be skeptical as to the law's constitutionality going forward, it also afforded the defendants the opportunity to develop the record and to ameliorate the perceived deficiencies. (*Id.* at 1046.) The practical implication of the Second Circuit's remand is that parties will engage in extensive litigation and any ultimate ruling on the constitutionality of the statute, factoring in near-certain appeals, will not be immediately forthcoming, at least within the federal courts. Until such time, it is clear that no federal court has made a substantive ruling as to the law's constitutionality, and therefore, there has been no outright change in the law. Consequently, *Melendez* does not support plaintiff's motion to renew.

The second problem with plaintiff's argument is with the notion that *Melendez* would have changed the prior determination. While the Court recognizes that the development of case law in other, non-binding court systems may constitute a change of law for purposes of motions to renew here, it also recognizes that, on the original motion, the court must have actually relied upon the subsequently reversed case law of the other court. (*See NY State Pub. Empl. Relations Bd.*, 103 AD3d at 151-152). Here, that did not happen. The previous justice of this court made clear on the record that, while *Melendez* implicated some of the same disputed issues between the parties to this litigation, he did not rely on any federal cases in his decision to deny plaintiff summary judgment. (NYSCEF doc. no. 43.) Without prior reliance on overturned caselaw in the Second Circuit, *Melendez* remains persuasive, though not controlling, authority. And though the court's previous wait-and-see approach to the original motion might have invited the parties to seek a more definite ruling post-*Melendez*, the court cannot grant a motion to renew where the previous decision did not rely on another court's overturned caselaw.

Lastly, plaintiff's argument must fail because, after reviewing the parties' motion papers and the *Melendez* decision, the Court concludes that the Guaranty Law is constitutional.[14] This conclusion is heavily informed by Justice Carney's dissenting opinion in *Melendez*. In the Court's view, Justice Carney persuasively demonstrated that *Allied Structural Steel* represents an anomaly in the Supreme Court's Contracts Clause jurisprudence from which it quickly retreated and therefore, when the majority relied upon *Allied Structural Steel*, it applied heightened scrutiny to the Guaranty Law where rational-basis scrutiny was required. (*See Melendez*, 16 F4th at 1052-1057 [Carney, J., dissenting].)

The majority opinion described *Allied Structural Steel* as effectively putting teeth back into the Contracts Clause. Whether this is the case or not, the Supreme Court backtracked when presented with the next set of Contracts Clause challenges. In *Energy Reserves Group*, decided six years later, the Supreme Court was not concerned with whether the severity of the contractual impairment aligned with how closely the law addressed its public-interest purpose. Instead, the court granted the legislature substantial latitude to regulate the gas industry, including by impairing the value of the "indefinite price escalator" contracts. (459 U.S. at 418.) Notably the Court's minimal "reasonableness" analysis did not subject the law in question to alternative regulations the legislature could have passed to implement its purpose. (*Id.*; *contrast with Melendez*, 16 F4th at 1039-1046 [finding the city council could have imposed a moratorium, raised taxes or appropriated funds to benefit affect landlords, or more narrowly tailored the law to reflect small business needs].) If the Court's standard in *Energy Reserves Group* to this point could be described as rational basis, it continued in that mold when it found that the law at issue was appropriately tailored "particularly in light of the deference to which the Kansas Legislature's judgment is entitled. (*Id.* at 418.)[15]

---

[14] In its motion papers, plaintiff not only asks the Court to grant it summary judgment, thereby ruling on the constitutionality of the law, but opposes defendant's motion to stay proceedings until the district court has had an opportunity on remand to address the Second Circuit's decision. Accordingly, the Court will address plaintiff's argument.

[15] Various academics and commentators have expressed their belief that courts post-*Energy Reserves Group* apply rational-basis review to Contracts Clause challenges. Erwin Chemerinksy wrote in *Constitutional Law: Principles & Policies* (6th ed. 2019) that "state and local laws are upheld, even if they interfere with contractual rights, so long as they meet a rational basis test." Likewise, in *The Contract Clause: A Constitutional History* (2016), James W. Ely

In *Keystone Bituminous Coal Ass'n v DeBenedictis* (480 U.S. 470 [1987]), the Supreme Court cited to *Allied Structural Steel* for the proposition that "statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested for the common weal, or are necessary for the general good of the public," but omitted the language, relied upon by the majority, regarding the "severity of the impairment measures the height of the hurdle the state legislation must clear." (*Id.* at 503-504, citing *Allied Structural Steel*, 438 U.S. at 241.) Instead, the Court, citing *Energy Reserves Group*, wrote that "we have *repeatedly held* that unless the State is itself a contracting party, courts should properly defer to legislative judgments. (emphasis added)" (*Keystone*, 480 U.S. at 506.) On this basis, it refused to "second-guess" the commonwealth's determination as to the most appropriate ways to deal with the social problem. (*Id.*)

As Justice Carney's dissent noted, deference to the legislature's judgments on reasonableness and appropriateness in Contract Clause cases has become standard practice for the Second Circuit. (*See e.g., Buffalo Teachers Fedn. v Tobe*, 464 F3d 362 [2d Cir 2006]; *Sal Tinnerello & Sons, Inc. v Town of Stonington*, 141 F3d 46 [2d Cir 1998]; *CFCU Community Credit Union v Hayward*, 552 F3d 253 [2d Cir 2009]; *Donohue v Cuomo*, 980 F3d 53 [2d Cir 2020].) The Second Circuit in *Buffalo Teachers* concluded that under Supreme Court precedents, decisions of city and state legislatures are, irrespective of circumstances, entitled to *some* degree of deference and that courts should not, on *de novo* review, reexamine all the factors underlying the legislation at issue. Critically, this is true even where the legislature acted self-servingly by impairing its own contracts. Where there are no allegations that the legislature acted in its own self-interest, the deference afforded should be at its zenith. In the *Buffalo Teachers*, the court wrote that applying "a high level of judicial scrutiny of the legislature's actions would harken to a dangerous return to the days of *Lochner*, in which courts would act as super legislatures, overturning laws as unconstitutional when they 'believed the legislature acted unwisely.'" [16](citations omitted) (*Buffalo Teachers*, 464 F3d at 371.) In summing up the standard to apply to the Guarantor Law, the majority opinion in *Melendez* even acknowledged that the appropriate review is not so exacting as that applied to self-serving laws. (*Melendez*, 16 F4th at 1032.)

However, the Second Circuit afforded the legislature *no* deference and applied, from all appearances, the narrowly tailored prong of strict scrutiny. The court described the legislature's reasoning like this: "(a) that shuttered small businesses are usually owned by the individuals guaranteeing their leases, (b) that these owner-guarantors would be financially ruined if required to pay their businesses rent arrears, and (c) that financially ruined owners would be unlikely to reopen shuttered businesses." (*Id.* at 1040.) It then criticized the legislature's assumption as to prong (c) because, in its view, were the law to serve its purpose, it would have included language conditioning financial relief on whether guarantors owned an affected businesses or on the affected guarantor's future intention to reopen the business. In the absence of this language, the majority found that the law excuses rent obligations in certain circumstances that does not

---

explains that the "test is little different than rational basis review of economic legislation under the due process norm." For a more detailed discussion, see Justice Carney's dissent. (*Melendez*, 16 F4th at 1052.)

[16] The Court invokes *Lochner* only to suggest that courts—whether in the Due Process or Contract Clause context—ordinarily defer to the judgment of legislatures where the challenged law involves conflicting economic interests between two groups who have equal access to the political branches of government.

benefit the public. (*Id.* at 1041.) It concluded, "such deference is not warranted in the absence of some record basis to link purpose and means that, otherwise, appears missing." (*Id.*)

This court concludes differently. Though the Guarantor Law may not make it explicit, the law *does* condition financial relief on whether guarantors owned the affected business—hence prong (a) in the circuit court's analysis—and on a guarantor's need, which is fully demonstrated through their business's default. Neither the instant action nor *Melendez* involve a defendant other than the small business' (natural-person) owner. The majority did not cite to, and this Court's thorough research did not reveal, any litigation in which such a non-small business owner asserted a right to relief under the statute. With a dearth of this type of litigation, it is unclear when, if ever, the law excuses rent obligations that does not benefit the public

This point is more forceful when the City Council's purpose is given its proper scope. The Second Circuit's analysis narrowly considered deference in terms of the council's "neighborhood-preserving" interest. Again, this interest focuses of the idea that the Guarantor Law would make it easier for small business owners to one day relaunch a thriving business, thereby ensuring the vibrancy of an essential part of New York City's neighborhoods. Yet the legislature's purpose was not confined to making sure owners would be more likely to reopen shuttered businesses post-pandemic. As discussed *supra*, the council passed the law with more short-term concerns in mind as well. These interests included the overall well-being of New Yorkers who relied upon the continued operation of the city's businesses and ensuring owners would not be financially ruined by extraordinary conditions outside their control. Viewed in this light, prong (b) is not just a logical assumption, but rather a separate purpose, an end in-and-of-itself that justifies the law's intended relief. The majority missed this point when it attached significance to the absence of promises to reopen post-pandemic made by business owners at the City Council's public hearings while, in the same breath, dismissed their professed concern for their employees and the immense personal hardship they would face should they become personally liable.[17] (*Id.* at 1040-1041.) If helping small businesses owners and all the people who rely upon them avoid the worst of the consequences associated with the city's COVID-19 measures is a legitimate public interest, then the link between purpose and means is not at all absent and the legislature's judgment concerning the law's reasonableness merits deference.

The concern that there is no connection between the Guarantor Law and the future viability of small business is even less persuasive when considering that the Guarantor Law likely *already* has served, at least partially, its stated public purpose. As numerous business owners testified at the City Council's public hearings, they considered the law necessary in order to change the incentives of landlords to renegotiate leases during the pandemic. (*Id.* at 1007 n.32, 1063-1064.) As one owner testified, businesses would not survive unless the Guaranty Law passed because "suspending our personal liability for our commercial leases will go a long way toward persuading landlords to take us small business owners seriously." Another testified that

[17] The majority compares the Guaranty Law to legislation like the Federal Paycheck Protection Program, which conditioned relief on a small business' continued operation as well as spending a certain percentage on payroll expenses. While the two laws may be aimed at a similar public purpose, one was designed to provide (forgivable) loans to keep business operating, the other provided relief in the unfortunate situation where the business fails. It is unclear why conditioning relief on a business' continued operation in the first instance is a useful comparison for the second, when that relief, through litigation, necessarily comes years after the business failed.

"[we] will NOT survive if we cannot completely renegotiate our leases post-COVID." (emphasis original) (*Id.*) With the Guaranty Law in place, commercial landlords who, to that time, had refused to renegotiate would assume the additional risk that post-pandemic courts might refuse to enforce the guaranty agreements, and thereby make it more difficult to collect rent in arrears.[18] Of course, it is difficult to trace the extent to which small businesses may have been aided in this manner given that owners who continued payment on any re-negotiated leases would not be parties to the type of litigation here.[19] Regardless, the point remains: with this testimony from owners, the City Council reasonably connected the Guarantor Law (and the *threat* of permanently excusing guarantor obligations) to the wider economic need to re-negotiate lease terms in line with pandemic economic conditions. All of these considerations suggest that the City Council chose a measure appropriate to combat a major problem concerning a large portion of its citizens.

Applying a form of rational basis review and affording the City Council the deference warranted, the Court finds that the Guaranty Law is a reasonable and appropriate measure. The law's design is limited in multiple ways to the economic injury that New York City business owners faced while the executive orders were in effect. As discussed above *ad nauseum*, it applies only to an extremely narrow subset of guarantor agreements. Further, the City Council made the law retroactive to cover defaults from the start of the pandemic through the summer, extended it when New York City experienced a second wave, and then ended its applicability when the executive orders were lifted in June 2021. This demonstrates that the City Council enacted the legislation when the magnitude of the financial injury facing owners became apparent but set a cutoff date when the situation changed. Lastly, the law recognizes that, while guaranty agreements may act as an inducement to enter leases with certain tenants, they are not the principal contract on which a landlord is entitled to rent. The law does not impair a landlord's bargain on the underlying lease agreements themselves: as the district court noted, landlords may still use alternative means to recover rental income, taxes, fees and other relief as entitled to on the lease. (*Melendez*, 503 F Supp at 36.) Accordingly, because the Guaranty Law is aimed a legitimate public purpose and represents a reasonable and appropriate means for achieving such purpose, the Court holds that it does not run afoul of the Contract Clause, and thus is a constitutionally valid exercise of power.

Applying the Guaranty Law to Plaintiff's Claim

In its motion to renew, plaintiff revises the total amount that defendant allegedly owes. Plaintiff argues that defendant owes $113,579.50 for rent, taxes, and concessions through July 15, 20202; $98,880 for rent owed from August 2020 through January 2021 (when plaintiff re-leased the premise to another tenant); $48,000 for brokerage commissions; $36,776 representing the difference between what defendant would have owed and rent collected from new tenant from February 2021 through November 2021; and $397,732.65 due on the lease's liquidated

[18] Defendant has alleged that LTS East attempted to re-negotiate its lease, plaintiff refused to re-negotiate. (NYSCEF doc. no. 53, def. aff.)

[19] If one views the Guarantor Law as the policy choice it is, holding it to be unconstitutional would not only undermine the functioning of the democratic process, but would represent a policy *win* for commercial landlords, who, it seem likely, would be less willing in future emergencies to re-negotiate leases knowing their long-term leases were secure. Yet, a foundational principle of judicial review is that courts should refrain from engaging in policy formulation.

damages clause. (*See* NYSCEF doc. no. 37, Coppe aff.) The amount defendant allegedly owes is $696,576.65.

To summarize the Court's earlier findings, neither party disputes that the Guaranty Law applies to the one at issue here: defendant is a natural person, LTS East and Lions & Tigers restaurant were affected by the governor's Executive Order 202.3, and LTS East defaulted during the timeframe provided by the law. As the Guaranty Law bars enforcement of guaranty agreements where natural persons would become wholly or partially personally liable for "payment of rent, utility expenses or taxes owed by tenant under such agreement, or fees and charges relating to routine building maintenance," the Court finds that several of plaintiff's claims are unenforceable. (*See* Administrative Code §22-1005.) These include plaintiff's claim for $113,579.50 in rent, taxes, and concessions through June 2020, for $98,880 claim in rent owed through January 2021, and $36,776 in deficiencies through November 2021.

Likewise, plaintiff's claim for liquidated damages is unenforceable. The liquidated damages clause, Article 19, Section (e), measures such damages based on the "unpaid rent for which otherwise would have constituted the unexpired portion of the term" against the fair market value of the lease premise. (NYSCEF doc. no. 7.) Plaintiff argues that this section should be enforced against defendant because it is separate and apart from rent obligations as defined in other sections of the lease. While the lease may have intended the liquidated damages clause, once invoked, to replace rent obligations, the court does not find this dispositive as to whether the Guaranty Law applies. Defendant only invoked the liquidated damages clause in November 2020, after LTS East defaulted on the rent payments that the City Council has made unenforceable against defendant. Were the Court to enforce the liquidated-damages provision against defendant, it would be undermining the City Council's purpose in enacting the Guarantor Law. It would allow the very same rent obligations that are unenforceable against defendant to be used to calculate liquidated damages. Put slightly differently, the liquidated damages provision cannot so easily be differentiated from rent obligations as plaintiff suggests. The Court finds the provision unenforceable.

Lastly, the Guarantor Law is silent as to brokerage commissions. Plaintiff's claim for $48,000 is enforceable against defendant.

Accordingly, it is hereby

ORDERED that plaintiff 201 East 10th Street LLC's motion for leave to renew is denied; and it is further

ORDERED that plaintiff's motion for summary judgment under CPLR 3213 is denied, and that it's claims for $113,579.50 in rent through July 2020, for $98,880 in rent through January 2021, for $36,776 for deficiencies through November 2021, and $397,732.65 in liquidated damages are unenforceable against defendant, and therefore dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment under CPLR 3213 on its claims for $48,000 in brokerage commissions is granted; and it further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel of plaintiff shall serve a copy of this order along with notice of entry on all parties within ten (10) days of entry.

10/4/2022
DATE

DAKOTA D. RAMSEUR, 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