SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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EAST 14 REALTY, LLC,

Plaintiff,

- v -

RAVJI PATEL, DIVYESH PATEL, KHONDOKER SHAJAHAN, KHONDOKER H KABIR

Defendant.

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INDEX NO. 652067/2020

MOTION DATE 02/17/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 85, 86

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

In May 2020, plaintiff East 14 Realty commenced this action to recover $153,075.49 allegedly owed collectively by defendants Ravji Patel, Divyesh Patel, Khondoker Shajahan, and Khondoker Kabir pursuant to a guaranty agreement they all signed in 2012. In this motion sequence (003), plaintiff moves for summary judgment pursuant to CPLR 3212, which defendants oppose. Defendants also cross-move for an order vacating the note of issue that plaintiff filed on December 7, 2022, pursuant to 22 NYCRR 202.21 (e) and an order staying all proceedings in this matter pursuant to CPLR 2201 pending the resolution of the Court's Decision and Order dated September 13, 2022. For the following reasons, plaintiff's motion is denied and defendant's cross motion to vacate the note of issue is granted.

BACKGROUND

In July 2012, plaintiff entered into a five-year commercial lease agreement for the ground floor of 231 East 14th Street with non-party H.K. Second Ave Restaurant, Inc (hereinafter "HK Second Ave"), with the intention that the premise would be used to start a seafood restaurant and bar named Bait and Hook. As owners of HK Second Ave, defendants entered into a guaranty agreement. The relevant provisions of the agreement provide:

> "Guarantor's liability hereunder shall be for the later of the period from the date of commencement of the Lease and ending (a) 270 days after the commencement date or (b) the date the premises are vacated and possession is surrendered to Landlord by Tenant…The Guarantor's liability under this guaranty shall be limited to (i) any fixed and additional rent payable by Tenant pursuant to the terms of the Lease for the guarantor is liable and (ii) any reasonable cost and reasonable expenses that

may be recoverable by Landlord in enforcing this Guaranty." (NYSCEF doc. no. 26 at ¶ 9, Guaranty Agreement.)

According to affidavits from Khondoker Shajahan and Divyesh Patel, Ravji and Divyesh Patel sold their respective interests in HK Second Ave shortly after the lease commenced in October 2012 to Shajahan and non-party Mohammad Mia. (*See* NYSCEF doc. no. 75 at ¶ 6, Shajahan Affidavit; NYSCEF doc. no. 79 at ¶6-7, Divyesh Patel's Affidavit.) Then, in January 2015, Shajahan and Kabir sold their interest in the restaurant to Mia, who at this point became the sole owner and operator of HK Second Ave. (NYSCEF doc. no. 75 at ¶8.) Sometime in 2016, Shajahan and Divyesh visited plaintiff's office to remove themselves from the underlying lease and the guaranty. (*Id.* at ¶ 11.) Defendants allege that plaintiff accommodated this request by furnishing a guaranty to Mia in his name only. (*Id.* at 14 ["I personally observed Mr. Mia sign this guaranty and furnish it to [plaintiff's employees] who, along with their associates, counter-signed it and attached it to the lease"].) During this meeting, plaintiff allegedly informed defendants that Mia would be solely responsible to guaranty the lease from then on and that their obligations under the original guaranty agreement were extinguished. (*Id.* at 17; NYSCEF doc. no. 79 at ¶ 15.)

In July 2017, the lease term ended, yet HK Second Ave remained in possession of the premise. The terms of the lease provided that, should this happen, HK Second Ave would be liable to plaintiff for "per diem use and occupancy…equal to two (2) times [the rent] payable hereunder for the last year of the term of this lease." NYSCEF doc. no. 54 at ¶54 [c], Lease.) Thereafter, in 2019, plaintiff sent a lease renewal to defendants. Paragraph 8 of the proposed lease states, in pertinent part, "In order to induce Landlord to enter into this Amendment, the guarantors of the lease, Ravji Patel, Divyesh Patel, Khondoker Shajahan and Khondoker Kabir, affirm that the Guaranty of Lease dated July 2012, is reinstated and reaffirmed and remains in full force and effect as the Guaranty." (NYSCEF doc. no 78, proposed lease renewal.) Defendants did not sign the new lease as they no longer held interests in HK Second Ave.

Around this same time, Mia and HK Second Ave fell behind on rent obligations and plaintiff filed a nonpayment eviction proceeding against them. Plaintiff reportedly agreed to pay Mia $25,000 to vacate the premise. (NYSCEF doc. no. 79 at ¶23.) According to plaintiff's ledger, Mia and HK Second Ave owed a balance of $211,627.88 but now seeks only $153,075.49 from defendants as part of the balance owed is beyond the statute of limitations. Plaintiff did not name Mia or HK Second Ave as defendants. After plaintiff filed the instant action, Shajahan reached out to an employee of plaintiff, Yusef Bildirici, who told him that he was "fishing" for somebody to collect the outstanding rent, and since plaintiff's counsel is working per a contingent fee agreement, it costs the company nothing to pursue the instant matter. (NYSCEF doc. no. 62 at ¶ 24, Def. counter statement of material facts.)

PROCEDURAL HISTORY

In motion sequence 001, defendants moved for summary judgment under CPLR 3212, which the Court granted in a Decision and Order dated April 22, 2022. Thereafter, by Decision and Order dated September 23, 2022, the Court granted plaintiff's motion to reargue, and upon reargument, denied defendants' original motion. In its September 2022 Decision, the Court found that paragraph 9 of the 2012 guaranty agreement (which the Court described above)

applied to money owed to plaintiff after HK Second Ave retained possession of the premise even though the lease had expired. (NYSCEF doc. no. 44, September 2022 Decision.) Additionally, the Court wrote that the language of the 2012 guaranty agreement raised an issue of fact as to defendants' obligations "including whether defendants were liable for use and occupancy after the lease expired." (*Id.*)

Pursuant to that same Decision and Order, the Court held a preliminary conference with the parties on October 25, 2022. At the conference, the Court ordered defendants to serve a demand for a bill of particulars by November 25, 2022, and required plaintiff to file the not e of issue and certificate of readiness by January 20, 2023. Plaintiff did so on December 6, 2022, while also moving for summary judgment. Defendants thereafter moved to vacate the note of issue so that it can serve a demand for documents and depose the two plaintiff employees who signed Mia's guaranty documents.

DISCUSSION

In a motion for summary judgment under CPLR 3212, the moving party bears the initial burden of establishing that no material issues of triable fact exist and that he is entitled to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made this prima facie showing of entitlement, it is incumbent on the opposing party to produce evidence in admissible form sufficient to raise a triable issue of material fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) However, the opposing party may defeat a summary judgment motion by arguing that facts essential to justify opposition may exist but such facts are within the exclusive knowledge and possession of the moving party. (*Bailey v NY City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000] ["A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"].) 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].) Here, the Court finds summary judgement to be inappropriate at this juncture.

While plaintiff has demonstrated that the 2012 Guaranty Agreement, on its face, appears to obligate defendants to pay obligations arising from the lease through to when HK Second Ave actually vacated the premise, defendants have raised numerous issues of material fact that suggests this 2012 agreement was no longer operational as early as 2016. As described *supra*, both Khondoker Shajahan and Divyesh Patel testify from personal knowledge that plaintiff represented to them that their obligations had been extinguished and that Mia was the sole guarantor of all liabilities incurred under the lease. Contrary to plaintiff's assertion, these representations that plaintiff made to defendants do in fact create issues of fact as to whether the agreement was still in effect after Mia and HK Second Ave became holdovers. Indeed, considering that plaintiff sent a lease renewal to defendants that attempted to "reinstated and reaffirmed" the full force of the 2012 agreement, plaintiff's guaranty agreement with Mia appears to have convinced *plaintiff* that the 2012 agreement with the defendants had been terminated.

Defendants have also shown the required "evidentiary basis" to suggest that additional material evidence is solely within the knowledge and possession of plaintiff's employees. (*Bailey v NY City Tr. Auth.*, 270 AD2d at 157.) This evidence consists of testimony by plaintiff's employees, along with supporting documentation, related to the company's two agreements with Mia—the 2016 Guaranty Agreement and the 2019 $25,000 agreement to vacate. The terms of these agreements along with testimony regarding the representations to defendants potentially limits or completely extinguishes defendants' liability. For example, though the 2012 Guaranty agreement prohibits the parties to modify or terminate the agreement orally, if the truth of the allegations were to be shown through plaintiff's testimony, the doctrine of promissory estoppel would prevent plaintiff from using these terms in a summary judgment motion. Moreover, as defendants point out, discovery in connection with plaintiff's 2019 agreement to pay Mia $25,000 might potentially reveal that plaintiff waived all of Mia and HK Second Ave's obligations on the lease and, therefore, waived any obligations defendants accrued under the guaranty agreement since plaintiff could no longer demonstrate its tenant defaulted on its obligations under the lease. Since defendants have demonstrated both the existence of material issues of fact and that other evidence being held by plaintiff is solely within its possession, granting summary judgment is inappropriate at this time.

For similar reasons, the Court grants defendants' motion to vacate the note of issue ("NOI"). In *Ortiz v Arias* (285 AD 390 [1st Dept 2001]), the First Department found that the IAS court should have granted defendants' motion to vacate the NOI where they not only demonstrated they had a meritorious claim, but the certificate of readiness contained erroneous statement of fact, including the statement that all discovery had been completed or waived. (*Id.* at 390.) According to the court, the erroneous statements on the NOI and certificate of readiness violated the requirements of 22 NYCRR 202.21 (a). Here, pursuant to 22 NYCRR 202.21 (e), the Court finds that plaintiff misstated that "discovery proceedings now known to be necessary completed" was not required and the NOI is vacated.[1] Lastly, defendants did not waive their right to conduct further discovery even as it missed the Court imposed deadline to demand a bill of particulars by the time plaintiff filed the note of issue approximately six weeks before it was required.

The Court however denies defendants' motion to stay the instant proceeding pending the outcome of its appeal of this Court's September 2022 Decision to the First Department. Defendants' position is that it is likely to succeed on the merits of its appeal. Yet defendants' position is, obviously, the exact position which this Court previously considered and rejected. Defendants have not identified any other reason to stay the instant proceeding. Accordingly, this branch of defendants' motion is denied.

Accordingly, for the foregoing reasons, it is hereby

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[1] 22 NYCRR 202.21 (e) provides that a party may move to vacate the NOI within 20 days. Here, defendants did not meet this technical requirement. However, they did raise the issue of the NOI with plaintiff's counsel and parties stipulated within two weeks of the NOI being filed that the return date for plaintiff's summary judgment motion and defendants' opposition and cross motions would be adjourned to January 23, 2023. Accordingly, the Court finds defendants' motion timely. But even if it were not considered timely, 22 NYCRR 202.21 (e) allows the Court on its own motion to vacate the note of issue if it finds that a material misstatement of fact has been made.

ORDERED that plaintiff East 14 Realty LLC's motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

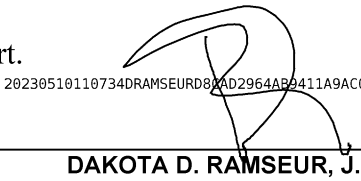
ORDERED that the branch of defendants' Ravji Patel, Divyesh Patel, Khondoker Shajahan and Khondoker Kabir's motion to vacate the note of issue pursuant to 22NYCRR 202.21 (e) is granted; and it is further

ORDERED that defendants' motion to stay the instant proceeding is denied; and it is further

ORDERED that the parties shall appear at 60 Centre Street, Courtroom 341 at 10 a.m. on May 23, 2023, for a status conference with the Court; and it is further

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

This constitutes the Decision and Order of the Court.



5/9/2023
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