SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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L. SHAFFER CO. LLC,

Plaintiff,

- v -

MICHAEL GLICK, SUSAN SALVO GLICK, YVETTE GLICK SHUKAT, ESTATE OF PETER GLICK, and STEVEN JAY LLC,

Defendants.

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INDEX NO. 650682/2021

MOTION DATE 02/01/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 50, 51, 52, 53, 57, 58, and 59

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, the defendants' motion to dismiss the amended complaint is granted to the extent set forth hereinbelow.

Background

This action arises from a commercial lease between plaintiff ("Landlord") and defendant Steven Jay LLC ("Tenant"). Pursuant to the lease, Tenant operated a restaurant known as Parlor Fish and Steak in the storefront and basement located at 1600-1602 3rd Avenue, New York, New York (Lease, NYSCEF Doc. No. 20). Relevant to the instant action, the lease rider provides that:

> If Tenant returns possession of restaurant and premises to Landlord, voluntarily or involuntarily, Tenant agrees to execute all necessary papers and documents to enable Landlord or Landlord's designee to secure a liquor license, and Tenant shall deposit its liquor license with Joshua Glick, Esq. so that Landlord or his assigns may be able to obtain its own liquor license. This sentence shall survive and continue until a new liquor license is issued to Landlord, his assigns or

> nominee(s). Tenant agrees not to surrender Tenant's liquor license(s) to SLA[1] until Landlord or new Tenant makes applications and transfers tenants liquor license(s) to new Tenant or Landlord.

(Lease Rider, NYSCEF Doc. No. 21, ¶ 30.) Further, all payments to Landlord based on any provision of the lease and its rider other than the base rent "shall be deemed additional rent and, in the event of any non-payment thereof, Landlord shall have all rights and remedies provided for herein or by law for nonpayment of rent" (*id.*, ¶ 18). Notice of default is required for any defaults under the lease or its rider "other than the covenants for the payment of rent or additional rent" (Lease, NYSCEF Doc. No. 20, ¶ 17). Such notices "shall be in writing, sent by courier, personal delivery, or by overnight express delivery, certified mail, return receipt requested, and by regular mail with certificate of mailing to the [premises] . . . . Notice to Tenant or to Tenant's attorney shall be sufficient notice" (Lease Rider, NYSCEF Doc. No. 21, ¶ 31).

Landlord asserts five causes of action herein. First, Landlord alleges several items of damage to the premises caused by Tenant either during the term of the lease or upon expiration of the lease (Amended Complaint, NYSCEF Doc. No. 51, ¶ 19). Second, Landlord separately alleges that Tenant failed to cooperate with Landlord to obtain a new liquor license following expiration of the lease, specifically by surrendering "the liquor license to the New York State Liquor Authority and did not execute any of the additional documents needed to help Plaintiff secure a liquor license" (*id.*, ¶ 31). Third, Landlord seeks the late fee on an invoice for additional rent for the amount of the damages sought pursuant to the first and second causes of action (*id.*, ¶¶ 39-46). Fourth, Landlord asserts a cause of action for attorneys' fees as provided in the lease and guarantees signed by the individual defendants; and fifth, a cause of action against the individual defendants upon the same grounds as those against the Tenant.

[1] The State Liquor Authority.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id*. at 87-88). Ambiguous allegations must be resolved in plaintiff's favor *(JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

As an initial matter, the court must first determine whether Tenant was properly served with the complaint and amended complaint. Landlord concedes that it did not attempt to serve Tenant with process (NYSCEF Doc. No. 57 at 9 n 7). Instead, Landlord alleges that Tenant was properly served pursuant to the lease rider, which provides that Tenant "waive[s] the personal service of any process upon [it] in any action or proceeding therein and consent[s] that such process be sent certified or registered mail or overnight express delivery . . . directed to the Tenant . . . at Tenant's address hereinabove set forth, (1600 Third Avenue, New York City)" (Lease Rider, NYSCEF Doc. No. 21, ¶ 40). Landlord does not submit an affidavit of service,

instead alleging in the body of the complaint that Tenant was served by personal delivery on defendant Michael Glick at his home address (*id.*).

"[P]arties to a contract are free to contractually waive service of process" (*Alfred E. Mann Living Tr. v ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 140 [1st Dept 2010]). The court is bound, however, to enforce the unambiguous terms of the service provision herein, as with every contractual provision (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing"]). The lease provides that Tenant is to be served in its own name at the address provided in the lease, 1600 Third Avenue, New York City (Lease Rider, NYSCEF Doc. No. 21, ¶ 40). Landlord concedes that it did not do so, instead serving defendant Michael Glick, who Landlord asserts is a member of Tenant, at his residence (Amended Complaint, NYSCEF Doc. No. 35, ¶ 16). Landlord's contention that it can simply change the service requirements of the lease from a method it argues is merely "technically effective" (*id.*) finds no support in the lease provisions.

However, the waiver of personal service does not mean that personal jurisdiction may not be obtained by service of process, assuming that the statutory requirements are met. CPLR 311-a provides that, as a limited liability company, service on Tenant may be had by service on any of its members (CPLR 311-a [a][i]). Landlord does not allege that it served Mr. Glick with papers intended for Tenant rather than in his own individual capacity as a guarantor of the lease, but defendants do not dispute that Mr. Glick is a member of Tenant, nor that he received a copy of the papers. Where both a corporate entity and an individual officer are named as defendants, service on both may be effectuated by service of one copy of the papers on the individual

defendant (*Matter of Stony Cr. Preserve, Inc.*, 121 AD3d 1376, 1377 [3d Dept 2014]; *Green v Gross and Levin, LLP*, 101 AD3d 1079, 1080 [2d Dept 2012]). Thus, Landlord has adequately served Tenant so as to obtain jurisdiction over it.

Defendants next argue that Landlord did not give proper notice of the damages it is presently seeking. The lease rider provides that notice to Tenant by overnight delivery is sufficient notice (Lease Rider, NYSCEF Doc. No. 21, ¶ 31). Tenant's address provided in the lease, other than as relates to the service provision, is 13 Agnes Circle, Ardsley, New York (Lease, NYSCEF Doc. No. 20 at 1). Landlord attached proof of overnight mail and delivery to that address of the notice of additional rent that encompasses the damages sought herein as an exhibit to the amended complaint (Proof of Delivery, NYSCEF Doc. No. 40). Defendants argue that the amount of damages sought in the notice differs from the damages sought in the complaint, and therefore notice is insufficient. A review of the damages listed in the notice shows that Landlord noticed the items of damage and equipment removal that are the subject of the first cause of action, the lost rent related to defendant's alleged breach of the liquor license provision that is the subject of the second cause of action, the late fees that are the subject of the third cause of action, and the attorneys' fees incurred which are the subject of the fourth cause of action notice of additional rent (*see*, NYSCEF Doc. No. 49). Given that Landlord established that Tenant received the notice, which provided sufficient information as to Landlord's claims, substantial compliance with the notice provision is sufficient even if the total amount sought is not the same (*Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assoc., LLC*, 129 AD3d 807, 810 [2d Dept 2015] ["Substantial compliance will be found where there is sufficient correspondence between the parties to give . . . actual notice of the claims"]). Defendants argue that the notice requirement is a condition precedent requiring strict compliance, but strict compliance is not

necessary where, as here, the notice requirement in the lease does not set forth consequences for failure to strictly comply (*id.* at 809).

Defendants make no other arguments in favor of dismissing the first cause of action. Turning to the second cause of action, the liquor license provision of the lease rider provides that in the event that Tenant returns possession of the premises to Landlord, Tenant is required to do three specific things: (1) "execute all necessary papers and documents to enable landlord to secure a liquor license," (2) "deposit its liquor license with Joshua Glick, Esq.," and (3) refrain from surrendering its license to the SLA until Landlord or a new tenant "makes applications and transfers Tenant's liquor licenses to new Tenant or Landlord" (Lease Rider, NYSCEF Doc. No. 21, ¶ 30). Landlord concedes that it is not seeking to hold defendants liable for failing to deposit the liquor license or refrain from surrendering it to the SLA (NYSCEF Doc. No. 57 at 6). The court notes that it would have been illegal for Tenant to have done either of those things (*see,* Alcoholic Beverage Control Law § 111 [a liquor license "shall be available only to the person therein specified, and only for the premises licensed and no other except if authorized by the authority"]; Alcoholic Beverage Control Law § 114[2] ["No license shall be transferable or assignable"]; NY State Liquor Authority Advisory Op No. 2015-5 ["If a licensee permanently ceases using its license (for example, because the business is being closed or the business has been sold to another entity) before the expiration date of the current license certificate, the licensee certificate must be submitted to the Authority for surrender"]). The complaint is devoid, however, of anything other than conclusory allegations that defendants failed to "execute all necessary papers and documents to enable Landlord to secure a liquor license" (Lease Rider, NYSCEF Doc. No. 21, ¶ 30).

Landlord's sur-reply (NYSCEF Doc. No. 57 at 7) suggests several things that defendants could and should have done instead. Assuming arguendo that these suggestions comply with the relevant provisions of the Alcoholic Beverage Control Law and the SLA's regulations, none of them are required by the unambiguous terms of the lease.[2] As stated above, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co.*, 1 NY3d at 475). For similar reasons, Landlord's attempt to allege a breach of the implied duty of good faith and fair dealing also fails, as the implied duty may not be used to create obligations in excess of or in conflict with the unambiguous terms of the contract (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 304 [1983] [holding that the implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties"]).

With regard to the third cause of action for late fees incurred on the additional rent claimed in Landlord's notice thereof, Landlord concedes that the lease directs a late fee of effectively 60% per year on unpaid rent and additional rent (*see*, NYSCEF Doc. No. 57 at 8). Landlord belatedly seeks to reduce its demand in the amended complaint to 25%, or the maximum allowable rate pursuant to the Penal Law (Penal Law § 190.40). However, and contrary to the authority cited by Landlord, late fees in excess of the amount specified in the Penal Law are usurious and unenforceable, even in a commercial lease (*Cleo Realty Assoc., L.P. v Papagiannakis*, 151 AD3d 418, 419 [1st Dept 2017]). When a party claims interest in excess of the rate, it may not recover any amount on such a claim (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]). Plaintiff asks the court to exercise its authority to reform the lease to avoid what it maintains is an unconscionable result, under Real Property Law § 235-c[1]). In

[2] Moreover, none of these suggestions are alleged in the complaint.

light of the authority cited above however, the court declines to do so (Dan M. Blumenthal, Practice Commentaries, McKinney's Cons Laws of NY, Real Property Law § 235-c ["However, late charges which exceed the amounts deemed criminally usurious will be unenforceable when examined in the light of the public policy expressed in Penal Law § 190.40"]).

Finally,[3] defendants seek dismissal of the fourth cause of action for attorneys' fees on the grounds that a separate cause of action for attorneys' fees may not be pleaded. As set forth in a case cited by both sides, a separate claim for attorneys' fees should be dismissed, but such dismissal does not preclude recovery of attorneys' fees as damages on a distinct cause of action (*La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]). The court will do the same here, and the dismissal of the fourth cause of action will not preclude Landlord from later recovering attorneys' fees should it succeed on its remaining claims as set forth in the prayer for relief.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the amended complaint is granted to the extent that the second, third, and fourth causes of action of the complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on October 4, 2023, at 2:00 PM.

[3] Defendants also ask that the complaint be dismissed as against them individually to the extent it is dismissed against the Tenant, but as the first cause of action against Tenant survives, the court need not address this argument further.

This constitutes the decision and order of the court.

ENTER:

8/25/2023
DATE

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