

389 Assoc. v Isabella's Jewels, Inc.

2023 NY Slip Op 34305(U)

November 20, 2023

Supreme Court, New York County

Docket Number: Index No. 656314/2020

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

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INDEX NO. 656314/2020

389 ASSOCIATES,

04/26/2023,

Plaintiff,

MOTION DATE 04/26/2023

- v -

MOTION SEQ. NO. 001 001

ISABELLA'S JEWELS, INC.,STEPHANIE GREENBERG

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

Defendant tenant, Isabella Jewels, Inc., leased a portion of the second floor known as Room 201 of the subject premises at 389 Fifth Avenue, New York, New York, from plaintiff landlord for the use as a “offices and showrooms for the sale (at wholesale only),” pursuant to a written lease agreement on November 30, 2006. Defendant guarantor, Stephanie Greenberg, signed the Good Guy Guarantee of the lease on November 20, 2006, which was modified and extended with the relevant “Extension Agreement” dated April 5, 2017, for a five-year term commencing on July 1, 2017, to June 30, 2022. Pursuant to the Extension Agreement dated May 5th, 2017, the monthly rent was \$2,318.55 per month for July 1, 2019, and June 30, 2020; and the monthly rent was \$2,388.10 per month for July 1, 2020, and June 30, 2021. (*See, NYSCEF Doc. No. 18*). According to the plaintiff, the tenant vacated the subject premises voluntarily on August 19, 2020. Plaintiff seeks to recover, from both defendants, rent owed under the lease, alleging that the tenant defaulted on its monthly rent payments, water and sprinkler charges and utility escalation charge in the amount of \$9,755.54 for the period of March 2020 through August 2020.

The plaintiff, 389 Associates, the owner of the subject premises located at 389 Fifth Avenue, New York, New York commenced this action for rent and additional rent due through August 31, 2020, against the defendant-tenant, Isabella’s Jewels Inc., and the guarantor, Stephanie Greenberg.

Before the Court is the *pro se* defendant Stephanie Greenberg’s motion to amend the caption, and to dismiss the defendant-guarantor, Stephanie Greenberg (“defendant-guarantor”),

from this action. In the motion, defendant Stephanie Greenberg argues, *inter alia*, that she should be personally dismissed from this lawsuit pursuant to *New York City Code §22-1005*, which releases personal liability of tenants under commercial leases that were considered non-essential retail establishments subject to in-person limitations, and the default for such obligation occurred between March 7, 2020, and June 30, 2021. Ms. Greenberg argues that businesses were completely shut down in Pennsylvania, where she resides, and in New York, where she leased the premises for a showroom. Defendant contends that the Covid-19 pandemic caused her business to shut down, and she tried to work with “Olmstead Properties and they said no discounts...and was told by [the] building super [to] never to come to [the premises] ever again.” Defendant also contends that she “got served in November 2020,” and attempted to retain an attorney through Legal Aid and the New York Bar Association, but she was unsuccessful. (*See, NYSCEF Doc. No. 11*).

In opposition, the plaintiff submitted the affidavit of David J. Koepfel, the managing agent for the premises located at 389 Fifth Avenue, New York, New York. Plaintiff also submitted the lease agreement between plaintiff and defendants, the Good Guy Guarantee executed by Stephanie Greenberg, the subsequent extension agreements, and the rent ledger through August 2020. (*See, NYSCEF Doc. Nos. 12-19*).

Plaintiff argues, *inter alia*, that defendant-guarantor acknowledges that the defendant-tenant has not paid rent and additional rent, however the defendant-guarantor claims she should not be held liable because the tenant purportedly operated a retail establishment whose operations were limited based on the government regulations as a result of Covid-19. Plaintiff also claims that the tenant voluntarily vacated the premises on August 19, 2020, with a balance due and owing of \$9,755.54. Plaintiff argues that the tenant was not permitted to operate a retail business, pursuant to the lease agreement, as the premises was solely for “offices and showrooms for sale (at wholesale only) of ladies accessories.” Plaintiff contends that during the Covid-19 pandemic, the premises was not rendered unusable by Covid-19 and remained open and accessible at all times for the Tenant’s use. Plaintiff refutes that the defendant is subject to the Covid-19 regulations for non-essential retail establishments subject to in-person limitations as “the tenant was *not* a non-essential retail establishment. Plaintiff also argues the defendants’ affirmative defense lacks merit as the plaintiff’s claims are not barred by the doctrine of frustration of purposes because the tenant’s performance under the Lease was for offices and showroom, and for no other purpose. Lastly, the plaintiff asserts that the financial difficulty of defendants or their economic hardship does not excuse the performance under the Lease.

In reply, defendant argues that defendant Isabella’s Jewels was a non-essential business that sold women’s belts in the retail establishment sector. Defendant also argues that her state governor issued a stay-at-home order on Monday, March 23, 2020, for Montgomery County in Pennsylvania, where she resides. She also argues that the Covid-19 pandemic changed everything, including the death of her mother, she was the caretaker of her dad, and her daughter who suffered with anxiety and OCD. She attests that she had been a responsible tenant for over 14 years, and that she tried to work with management to give her a discount, but they would not. She also

contends that management has her security deposit, and was told “to never enter 389 5th Ave building every again by Anton Shkreli.”

DISCUSSION

New York City, N.Y., Code § 22-1005 bars enforceability against a natural person of that person's guarantee of commercial-lease obligations if two conditions are satisfied: (i) The tenant's operations were halted or restricted under March 2020 COVID-related executive orders; and (ii) the “default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020, and June 30, 2021, inclusive.” *See, Administrative Code § 22-1005.*

9 NYCRR 8.202.6 states, in relevant part:

“Effective on March 20 at 8 p.m.: All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public.”

9 NYCRR §8.202.6.

The issue before the Court is whether the defendants’ business, which operated as “offices and showrooms for the sale (at wholesale only),” is classified as a nonessential business subject to the Governor’s executive orders which required to close or substantially reduce workforces as a result of the Covid-19 pandemic.

Here, this Court finds that the defendants’ business which sells or distributes women’s belts, in wholesale, in the retail establishment sector is classified as a nonessential business. There is nothing essential about selling women’s belts, whether in wholesale or at a retail shop, and this business is distinguishable from the essential business, such as health care, child care and providers of basic necessities to economically disadvantaged populations as delineated in the provision, 9 NYCRR 8.202.6. Here, defendant guarantor, Stephanie Greenberg, established that she was not liable, as the guarantor, for the unpaid rent of the commercial tenant for the period of March 2020 to August 2020. Defendant is covered by *Administrative Code of the City of New York*

§ 22-1005, a pandemic-related law, making unenforceable any lease provision imposing personal liability upon a non-tenant where the tenant had defaulted in paying the rent. *Administrative Code* § 22-1005 protects individual guarantors of rent for certain types of commercial tenants impacted by the COVID-19 pandemic – namely, nonessential businesses that were required to close or substantially reduce their workforces in accordance with Executive Order (A. Cuomo) No. 202.6 (9 NYCRR 8.202.6).

Here, the tenant was required to cease operations under *Executive Order 202.6*, and the defendant-guarantor became liable for tenant's accelerated rent during the statutory period of March 7, 2020, and June 30, 2021, pursuant to *Administrative Code* § 22-1005. Therefore, Defendant guarantor, Stephanie Greenberg is not personally liable for the rent owed for the period of March 2020 to August 2020. As such, the defendant guarantor's motion is granted, and the individual defendant, Stephanie Greenberg, shall be dismissed from this action, and the caption shall be amended to reflect said defendant's dismissal from this action.

Accordingly, it is hereby

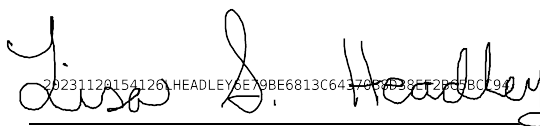
ORDERED that *pro se* defendant Stephanie Greenberg's motion to amend the caption, and to be dismissed from this action is **GRANTED**; and it is further

ORDERED that defendant shall file form EF-23 to reflect the change in the caption; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this Decision/Order upon the plaintiff with notice of entry; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.


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LISA S. HEADLEY, J.S.C.

11/20/2023
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE