SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

———————————————————————X

Index No. 709446/2020

ABLE MOTOR CARS CORP.

Plaintiff,

against

THREE BROTHERS CHINESE CUISINE INC.,
XING WU MEI

Defendants.

———————————————————————X

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT& BACKGROUND FACTS

Plaintiff Able Motor Cars Corp. ("Plaintiff") respectfully submits this Memorandum of Law in opposition to the motion by Defendants Three Brothers Chinese Cuisine Inc. ("Three Bros.") and Xing Wu Mei ("Mr. Mei," and collectively, "Defendants") to dismiss the Complaint herein pursuant to CPLR §3211 (a)(1) and (7). For the reasons set forth below, the motion must be denied.

The attention of this Court is respectfully directed to the affirmation of Sehzad M. Sooklall, Esq., dated the 23rd day of September 2020 and the affidavit of Michael Pescatore sworn to on the 23rd day of September 2020 a for a more detailed recitation of the facts of this matter.

As set forth in the Complaint, Plaintiff and Three Bros. entered into a written lease agreement (the "Lease") for the rental of approximately 2,200 square feet within the Baybridge Commons Shopping Center in Bayside, New York, as delineated on Exhibit B to the Lease (the "Premises") on September 4, 2019. The Lease term for the Premises is

for the period September 15, 2019, through April 30, 2031. To induce the execution of the Lease, Mr. Mei personally guaranteed the obligations of Three Bros. in a separate guaranty ("Guaranty"). A copy of the Summons and Complaint is annexed hereto as **Exhibit "A"**. A copy of the Lease is annexed hereto as **Exhibit "B"**. A copy of the Guaranty) is annexed as **Exhibit "C."**

On May 26, 2020, Mayor De Blasio signed into effect N.Y.C. Council Int. No. 1932-A (2020) and N.Y.C. Council Int. No. 1914-A (2020) (collectively, "Local Law 55 ") in furtherance of the city's response to the COVID-19 pandemic and its impact on small business activity.

In July 2020 Plaintiff sued Three Bros. and Mr. Mei for monetary damages arising from Three Bros. breach of the Lease by its failure to pay the rent of $8,695.02 that was due on March 1, 2020. There is no dispute that Three Bros. went into default when it failed to pay the minimum rent within five days of the March 1, 2020, date; to wit: on March 6, 2020.

Here, the Guarantee is **NOT** part of the lease agreement but a separate standalone agreement which was executed to induce the execution of the lease. Thus, since the plain language of Local Law 55 clearly dictates that it only applies to a lease or rental agreement involving real property that provides for one or more natural persons who is not the tenant under such agreement to have liability it does not apply to the case at bar since the stand alone guarantee creates the liability not the lease agreement.

Further, Defendants' own moving papers acknowledge that it was in default of the obligation to pay the March 2020 rent timely, admitting that it had only paid ½ the March 2020 rent.

As of September 1, 2020, Three Bros. currently owes $100,260.49 in rent and other charges. See **Exhibit "D."**

ARGUMENT

I. THE STANDARD ON A MOTION TO DISMISS

When examining the adequacy of a Complaint on a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true and provide the Plaintiff "the benefit of every possible favorable inference." Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002), quoting Leon v. Martinez, 614 N.Y.S.2d 972,974 (1994). The court must only determine whether or not the allegations in the Complaint fit within any cognizable legal theory for which relief can be afforded. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 134 (1st Dept 2014).

In other words, the test is whether, assuming the truth of every factual allegation made in the Complaint, the pleading states any cognizable cause of action, and not whether plaintiff has a viable cause of action based on the actual objective facts. Bruno v. New York News, Inc., 68 A.D.2d 987 (3d Dept 1979). The pleading must be liberally construed and the claim must be given every favorable inference which can reasonably be drawn from the allegations therein. New York Fruit Auction Corp. v. City

of New York, 81 AD.2d 159 (lst Dept 1981); Wernham v. Moore, 77 AD.2d 262, (lst Dept. 1980); Dunn v. City of Syracuse, 83 AD.2d 783 (4th Dept 1981).

Moreover, as set forth in Barrows v. Rozansky, 111 AD2d 105 (lst Dept. 1985):

> Upon a motion to dismiss a pleading for legal insufficiency, 'the court must assume that its allegations are true and must deem the complaint to allege whatever can be inferred from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein.
>
> Id. at 107 (internal citations omitted).

Not only must the Complaint be read in the light most favorable to Plaintiff, but New York has a well-settled policy in favor of sustaining pleadings. CPLR §3026, for example, states "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." CPLR §3026 (emphasis added). A review of the Complaint confirms that Plaintiff has properly pled each of the causes of action upon which it is suing.

On a motion to dismiss based upon documentary evidence pursuant to CPLR §3211(a)(l), dismissal is warranted only if "the documentary evidence submitted utterly refutes plaintiff's factual allegations." Amsterdam Hospitality Group LLC v. Marshall-Alan Assoc., Inc., 120 AD.3d 431,433 (lst Dept. 2014) (internal citation omitted) (where the documentary evidence did not **conclusively** provide a complete defense to plaintiff's claims, motion to dismiss was denied) (emphasis added).

Here, the documentary evidence, on the contrary, establishes that Plaintiff is pursuing valid causes of action. Consequently, this Court must sustain the Complaint because the facts, if taken as true, amply sustain the causes of action asserted.

II. LOCAL LAW 55 DOES NOT APPLY TO DEFENDANTs

Local Law 55 does not apply to the instant proceeding. The Local Law 55 provides in pertinent part:

> **A provision in a commercial lease or other rental agreement involving real property located within the city that provides for one or more natural persons who are not the tenant under such agreement** to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied (emphasis added):
>
> 1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
>
> (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020 ….
>
> 2. 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 September 30, 2020,** inclusive. (emphasis added).

Three Bros. admits in its moving papers that it had not paid the minimum rental amount of $8,695.02 due on March 1, 2020, and thus must acknowledge that it was already in default on March 7, 2020.

As Local Law only temporarily prohibits suing a Guarantor where the default occurred between March 7, 2020 and September 30, 2020, and the default hereunder

occurred prior, it is not a bar to the instant case nor can it ripen into grounds for dismissal.

Equally, Local Law 55 does not apply to the case at hand as the statutory language makes it clear that it only applies to those leases where the lease document itself imposes liability on someone other than the tenant. Here, a review of the lease annexed by the movant makes it clear that nowhere in the lease does the document impose liability upon co-Defendant Xing Wu Mei . Nor can the Guarantee be construed to be a rental agreement involving real property.

There can be no legitimate dispute that Xing Wu Mei did not execute a guarantee in a commercial lease nor did he execute any other rental agreement. *Contra,* the Guarantee is a separate document in which Xing Wu Mei agreed to guarantee the Tenant's performance of the lease terms to induce the Plaintiff to enter into the lease agreement with the tenant.

As the Guarantee does not fall within the parameters of Local Law 55, thus Local Law 55 does not bar this action mandating denial of the motion to dismiss.

III. This Action is Not One for Eviction.

The moving papers clearly misunderstand the law as to what constitutes an "eviction action" as this action does not seek "eviction" nor is it barred by any executive order, much less EO 202.28.

On May 17, 2020, Governor Andrew M. Cuomo issued Executive Order 202.28 ("EO 202.28"), which states in relevant part:

> I hereby issue the following directives for the period from the date

of Executive Order [March 7, 2020] through June 6, 2020:

> **There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent** or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020. (emphasis added)

There can be little doubt that the reference to "proceeding" in EO 202.28 refers to a summary proceeding which seeks payment of rent or in the alternative the recovery of possession of the premises ("eviction") as a consequence to the breach of lease for non-payment of rent. Indeed, that is the very language contained in the rent demand, the condition precedent to a summary nonpayment proceeding seeking payment or eviction based on failure to pay. See RPAPL §711.

Here, a perusal of the Complaint makes it clear that this is not a proceeding but an action. Nor is it an eviction proceeding to recover rent, or in the alternative possession of the premises, but strictly an action for monetary damages as a consequence of the breach of lease. Your affiant is unaware of any provision in the CPLR that permits eviction as a consequence to failure to pay monetary damages or judgment. More importantly, a perusal of the Complaint reveals that not one of the causes of action pled even seeks eviction as relief; rather each cause of action seeks a judgment for monetary damages.

Consequently, nothing in the executive orders issued by the Governor speaks to an action seeking solely a monetary judgment, prohibits this action against either Defendant or warrants its dismissal.

CONCLUSION

Defendants' motion is properly denied as it is premised on a misunderstanding of law and facts. The action before this Court is not an eviction proceeding but a claim for monetary damages arising out of a breached contract thus EO 202.28 is inapplicable. Likewise, Local Law 55 does not preclude the suing of Mr. Mei, the Guarantor as the guarantee is not a rental agreement nor is it part of the rental agreement but a stand-alone document and Three Bros. was in default prior to March 7, 2020.

For the foregoing reasons, as well as those contained in the Sehzad Sooklall Affirmation and the Michael Pescatore Affidavit, Plaintiff respectfully requests that Defendants' motion be denied in its entirety, along with such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York
September 22, 2020

Respectfully submitted,
WENIG SALTIEL, LLP

By:

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Commercial Division Rule 17 Certification

I hereby certify that, excluding the caption, signature block, and this word count certification, the total number of words in this affirmation is 1,933.

Dated: Brooklyn, New York
September 23, 2020

/s/ Sehzad M. Sooklall
Sehzad M. Sooklall, Esq