

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

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ABLE MOTOR CARS CORP.,

Plaintiff,

Index No. 709446/2020

-against-

THREE BROTHERS CHINESE CUISINE INC.,

XING WU MEI

Defendants.

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PURSUANT TO CPLR 3211(a)**

Law Offices of Chen & Associates, P.C.

Yimin Chen, Esq.

39-15 Main Street, Suite 502

Flushing, NY 11354

Tel: (718)886-4858

Fax: (800)490-0564

Attorneys for Defendants Three Brothers Chinese Cuisine Inc., and Xing Wu Mei

PRELIMINARY STATEMENT

Defendants Three Brothers Chinese Cuisine Inc. (“Three Bros”) and Xing Wu Mei (“Mr. Mei”), through their attorneys, Law Offices of Chen & Associates, P.C., respectfully submit this Memorandum of Law in support of their motion to dismiss this action pursuant to CPLR 3211(a)(1) and (7) because the actions were suspended by the Executive Orders issued by Governor Cuomo and the NYC Administrative Code.

STATEMENT OF FACTS

Plaintiff commenced the above-entitled action on July 7, 2020 by the filing of a Summons and Complaint through the New York State Courts Electronic Filing [NYSCEF] System. A copy of the Summons and Complaint is annexed to the Affirmation of Yimin Chen as Exhibit “A”. The Summons and Complaint was served upon Defendants on July 29, 2020. A copy of the Affidavit of Service is annexed to the Affirmation of Yimin Chen as Exhibit “B”.

In this instant action, Plaintiff seeks to recover damages arising from Defendants’ failure to perform the lease agreement between Plaintiff and Three Bros, in which Mr. Mei is the guarantor. However, such action was suspended and prohibited by the Executive Orders issued by Governor Cuomo and the NYC Administrative Code.

ARGUMENT

DEFENDANTS’ MOTION TO DISMISS SHOULD BE GRANTED

Pursuant to CPLR 3211(a), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence, or the pleading fails to state a cause of action.

Plaintiff's three causes of action all seek damages for events arising from the same subject matter that is governed by a lease agreement entered by Plaintiff and Three Bros on or about September 24, 2019, where Mr. Mei executed a Personal Guaranty of Lease.

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202. The order, issued in response to the rapidly escalating COVID-19 public health emergency, stated that "a disaster [was] impending in New York State, for which the affected local governments [would be] unable to respond adequately" and therefore the declaration of "a State disaster emergency for the entire State of New York" was necessary (Executive Order [A. Cuomo] No. 202).

On March 16, 2020, Mayor De Blasio signed an Executive Order limited restaurant to food take-out and delivery.

On May 17, 2020, the Governor Cuomo issued Executive Order 202.28 in response to the COVID-19 public health crisis in New York State, which among other things, stating

"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."

A copy of the invoices is annexed to the Affirmation of Yimin Chen as Exhibit "C".

Furthermore, 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, the "Legislation") in furtherance of the city's response to the COVID-19 pandemic and its impact on small business activity.

The Legislation temporarily prohibited the enforcement of personal liability provisions in commercial leases or rental agreements involving a COVID-19 impacted tenant. This would apply to businesses that were impacted by mandated closures and service limitations in the Governor's Executive Orders. Specifically, it covers (1) businesses that were required to stop serving food or beverages on-premises (restaurants and bars); (2) businesses that were required to cease operations altogether (gyms, fitness centers, movie theaters); (3) retail businesses that were required to close and/or subject to in-person restrictions; and (4) businesses that were required to close to the public (barbershops, hair salons, tattoo or piercing parlors and related personal care services). Specifically, the Legislation stated that "Threatening to or attempting to enforce such a provision would also be considered a form of harassment." A copy of the invoices is annexed to the Affirmation of Yimin Chen as Exhibit "D".

Herein, Defendant Three Bros is a restaurant located in Queens County, New York City, whose business was required to stop serving food or beverages on-premises since March 2020. As a COVID-19 impacted tenant, Three bros paid their rent and additional rent through February 2020 and paid 50% of the rent for March 2020. A copy of the invoices is annexed to the Affirmation of Yimin Chen as Exhibit "E".

Plaintiff commenced this instant action to enforce the personal liability provisions in a commercial lease and seek damages for Defendants' failure to pay rent, despite the above-mentioned Executive Orders and NYC Administrative Codes suspended and prohibited such action through August 19, 2020 the least.

CONCLUSION

For the reasons stated herein, Defendants' motion to dismiss pursuant to CPLR 3211(a) should be granted in its entirety, and Defendants should be awarded a judgment dismissing the above-entitled action, together with such other and further relief as this court deems just and proper.

Dated: Queens, New York
August 18, 2020

Law Offices of Chen & Associates, P.C.

By: /s/ Yimin Chen
Yimin Chen, Esq.
Attorney for Defendants
39-15 Main Street, Suite 502
Flushing, NY 11354
Tel: (718)886-4858