

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

ROUTE 6 OUTPARCELS, LLC,

Plaintiff,

-against-

RUBY TUESDAY, INC.,

Defendant.

DECISION
AND
ORDER

Index No. 2413-09
(RJI No. 01-09-096833)

(Judge Richard M. Platkin, Presiding)

APPEARANCES: SILLS CUMMIS & GROSS P.C.
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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff Route 6 Parcels, Inc., (“Route 6”) moves pursuant to CPLR 3212 for partial summary judgment on its breach of contract claim against defendant Ruby Tuesday, Inc. (“Ruby Tuesday”). Defendant opposes the motion, arguing that its non-performance was temporarily excused under the force majeure clause in the parties’ lease agreement due to the severe worldwide economic downturn.

BACKGROUND

Plaintiff Route 6 brought this action seeking to recover damages from defendant Ruby Tuesday for an alleged breach of a ground lease entered into between the parties on or about July 18, 2006 (“the Lease”). Pursuant to the Lease, defendant was to open a Ruby Tuesday restaurant on certain commercial property owned by Route 6 in Matamoras, Pennsylvania (“the Property”) within one year of March 1, 2008 and to operate said restaurant for at least thirty months thereafter. Ruby Tuesday agreed to pay Route 6 a monthly minimum rent plus additional rent equal to three percent of gross sales in excess of three million dollars.

Following execution of the Lease, plaintiff claims to have spent approximately \$300,000 on improvements to the Property to prepare the site for construction of the restaurant. However, in or about March 2008, Ruby Tuesday informed Route 6 that it had no present intention of opening a Ruby Tuesday restaurant on the Property. As of the submission of the instant motion, Ruby Tuesday has not constructed or opened a restaurant on the Property. On March 23, 2009, Route 6 sent a notice of default to Ruby Tuesday based upon this alleged breach of the Lease. The notice of default purported to cancel the Lease and demanded liquidated damages, attorney’s fees and costs. This action followed.

DISCUSSION

It is well established that summary judgment is a drastic remedy and should only be granted if there are no material issues of disputed fact (*Sillman v Twentieth-Century Fox Film Corp.*, 3 NY2d 395 [1957]). In evaluating a motion for summary judgment, a court should simply determine whether material issues of disputed fact preclude the grant of judgment as a matter of law (*S. J. Capelin Assoc. v Globe Mfg Corp.*, 34 NY2d 338 [1974]). The party moving for summary judgment has the initial burden of coming forward with admissible evidence to support the motion, so as to warrant the Court directing judgment in movant's favor; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Route 6 has met its initial burden of demonstrating a prima facie breach of contract through its submission of the Lease and an affidavit of a member of the plaintiff company, Bernard Rosenshein, averring, *inter alia*, that Ruby Tuesday failed to construct and operate a restaurant on the premises, as promised in the Lease (*see Manufacturers and Traders Trust Co. v True-Tone Sound*, 288 AD2d 951, 951 [4th Dept 2001]). The Court must then turn its attention to “whether defendant[] ha[s] come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense of the [claimed breach of the Lease]” (*Judarl v Cycletech, Inc.*, 246 AD2d 736, 737 [3d Dept 1998]). For the reasons that follow, the Court concludes that Ruby Tuesday has failed to meet this burden.

Ruby Tuesday admits that it has not begun construction of the restaurant, though it claims, without contradiction, that it has continued to pay the minimum base rent required under the Lease. As to the construction and operation of the restaurant, Ruby Tuesday asserts that its

“obligation to construct and open a restaurant on the Leased Premises is temporarily excused by operation of the force majeure clause in the Lease,” which recites:

Except for any payments due Lessor in accordance with this Lease, Lessor and/or Ruby Tuesday shall be excused for the period of any delay and shall not be deemed in default with respect to the performance of any of the terms, covenants, and conditions of this Lease when prevented from so doing by cause or causes beyond the Lessor’s and/or Ruby Tuesday’s control, which shall include, without limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, whether similar or dissimilar to the foregoing, not within the control of the Lessor and/or Ruby Tuesday.

In support of its defense founded upon the force majeure clause, Ruby Tuesday submits the affidavit of Franklin E. Southall, a Vice President and Corporate Controller of defendant, who avers, in pertinent part:

5. Due to the unprecedented worldwide economic meltdown, which began at approximately the same time Ruby Tuesday was scheduled to begin preparations to open the proposed restaurant . . . its commitments to lenders and other factors beyond its control, Ruby Tuesday has had to change its business model to ensure its survival as a going concern.

6. Accordingly, it is respectfully submitted that pursuant to the Lease’s force majeure clause, Ruby Tuesday should be excused from the obligation of opening the restaurant during the duration of the economic meltdown.

7. As I explain in greater detail below, in 2006 Ruby Tuesday began a comprehensive initiative to differentiate its restaurants from those of its peers in the industry. Unfortunately, at about the same time that it began the most capital intensive portion of this initiative, the world’s economy fell into a massive recession. This recession, coupled with double-digit declining same restaurant sales, has significantly impaired Ruby Tuesday’s financial condition.

8. As a result, Ruby Tuesday was compelled to take radical steps to ensure that it would survive the deepening economic crisis. These steps included the closing of over 50 underperforming restaurants, plans to close over two dozen more in the future, the

selling of surplus properties as expeditiously as possible and a freeze on new restaurant openings.

9. This new restaurant opening freeze included the restaurant Ruby Tuesday had anticipated opening on the parcel it leases from Route 6.

* * *

20. While Ruby Tuesday was in the midst of implementing its brand reimagining, the world's credit markets froze and the recession began to take its toll.

21. In or about mid-March 2008, an unparalleled economic crisis struck the world, beginning with a raft of bank failures and forced mergers and ultimately culminating in the freezing of world credit markets and unprecedented governmental intervention.

* * *

40. In light of the unprecedented circumstances discussed above, Ruby Tuesday determined that it would not be able to open a restaurant on the parcel of land it leased from plaintiff Route 6 . . .

41. The expenditures it would take to open the proposed restaurant on the Leased Premises would divert needed funds away from meeting debt obligations and leverage thresholds under its loan covenants.

42. Falling short of those obligations to its lenders . . . would place Ruby Tuesday at risk of violating its loan covenants which could lead to a series of significant negative consequences.

* * *

44. The confluence of factors that prevented Ruby Tuesday from opening a restaurant on the Leased Premises was beyond Ruby Tuesday's control.

45. Ruby Tuesday's inability to open a restaurant on the Leased Premises was not occasioned by its own fault, negligence or other culpable conduct.

In reply, plaintiff states that “Ruby Tuesday never provided any indication to Route 6 that it believed that its nonperformance was being temporarily excused by the force majeure provision. Instead, during this time period, Ruby Tuesday did not provide any indication to Route 6 that it would ever open a restaurant on the leased premises.” Plaintiff further argues that “an economic depression – let alone a recession – does not constitute a force majeure and does not excuse a party’s failure to perform.”

As an initial matter, the parties agree that this contractual dispute is governed by the substantive law of Pennsylvania. As noted by one Pennsylvania court, “state cases addressing force majeure are surprisingly few and far between” (*Rohm & Haas Co. v Crompton Corp.*, 2002 WL 1023435 [Pa. Ct. Com. Pl. April 29, 2002]). The leading Pennsylvania case addressing force majeure is *Martin v Pennsylvania, Department of Environmental Resources* (120 Pa Comm 269 [1988]), which holds:

In order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party’s control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. . . . Acts of a third party making performance impossible do not excuse failure to perform if such acts were foreseeable.

(*id.* at 273-274 [internal citations omitted]; *see also Rohm & Haas, supra* [collecting Pennsylvania authorities]).

The Court begins, as it must, with the plain language of the force majeure clause included in the Lease. The clause excuses non-performance (other than the failure to make monetary payments) for a period of delay “when prevented from so doing by cause or causes beyond the Lessor’s and/or Ruby Tuesday’s control.” The foregoing “shall include, without

limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, whether similar or dissimilar to the foregoing, not within the control of the Lessor and/or Ruby Tuesday.”

There can be no doubt that the “worldwide economic meltdown” described in Mr. Southall’s affidavit was an event beyond Ruby Tuesday’s control. However, the critical inquiry under the force majeure clause is whether Ruby Tuesday actually was prevented from constructing a restaurant on the Property due to events entirely outside its control and not due to any fault or negligence on its part.

Courts generally are reluctant to excuse contractual non-performance based on claims of economic hardship and changing economic conditions (*see Millers Cove Energy Co. v. Moore*, 62 F3d 155 [6th Cir. Tenn. 1995] and the cases cited *infra*). Further, it is well established rule of contract law that force majeure clauses must be narrowly construed (*see e.g. Reade v Stoneybrook Realty, LLC*, 63 AD3d 433 [1st Dept 2009]). But even assuming for purposes of this motion that a severe economic downturn is a triggering event that falls within the broad “catchall” language of the force majeure clause, the Court concludes that Ruby Tuesday has failed to demonstrate that it was prevented from complying with its obligations under the Lease due to events entirely outside of its control.

According to the Southall affidavit, Ruby Tuesday embarked on an ambitious plan in 2006 to differentiate its restaurants from competitors. As Ruby Tuesday entered the capital-intensive phase of this initiative, the worldwide economic crisis hit, thereby constricting its access to capital and causing decreased revenues at its restaurants. As a result, Ruby Tuesday took steps to improve its financial condition, including restructuring its indebtedness, closing

underperforming restaurants, selling surplus properties, and deferring the construction of new restaurants, including the one that is the subject of the Lease.

Defendant's decision to undertake a capital intensive expansion during a time of apparent economic growth and its subsequent responses to the severe economic downturn represent business decisions on the part of Ruby Tuesday, not events outside of its control. Likewise, in deciding how to scale back its capital needs and financial commitments to meet other obligations, including covenants with lenders and other financing sources, defendant necessarily considered (or had the opportunity to consider) the extent to which each of its possible courses of action were constrained by costs resulting from prior legal and contractual obligations, including the subject Lease. In essence, Ruby Tuesday's own submission reveal it had ultimate control over the decision whether or not to open a restaurant on the Property and that its failure to do so was the product of a decision to apply its limited financial resources towards other obligations.

Further, there has been no showing that the prospect of a severe economic downturn was not reasonably foreseeable. Commercial parties routinely enter into contractual agreements to allocate economic risk, and the risk of changing economic conditions or a decline in a contracting party's finances is part and parcel of virtually every contract, especially those involving commercial development. Indeed, the affidavit of Joseph D. Daniels, the former development director for Ruby Tuesday, observes that the Lease "was a relatively risky deal for Ruby Tuesday" even if economic conditions had remained stable, explaining that "the demographics of the [local] area were such that . . . the local population might not have been sufficient to support a Ruby Tuesday" (¶ 7). He goes on to aver that "even in good economic

times”, the Property might not “generate sufficient traffic to support a Ruby Tuesday restaurant (*id.* ¶ 8).

Thus, Ruby Tuesday entered into a “relatively risky” Lease that gave it exclusive use and occupancy of the Property based on, among other things, its promise to construct and operate a restaurant on the site and to pay a specified percentage of the restaurant’s gross sales to Route 6. Defendant cannot maintain its lease rights to the Property while depriving plaintiff of the full benefit of its bargain merely because Ruby Tuesday’s expansion plans proved to be improvident.

Indeed, a Pennsylvania state court, relying upon the precedent of New York courts, found unavailing a similar attempt to use a force majeure clause to excuse non-performance: “Plaintiff shut down its plant voluntarily due to financial considerations brought about by environmental regulations. Those are not circumstances constituting a force majeure event, and financial hardship is not grounds for avoiding performance under a contract” (*Rohm & Haas*, *supra*, at *5, quoting *Macalloy, Inc. v Metalurg, Inc.*, 284 AD2d 227 [1st Dept 2001]). To similar effect are cases under New York law, which appears to be identical to Pennsylvania law in all respects material to disposition of the instant motion (*Urban Archaeology Ltd v 207 E. 57th St. LLC*, 68 AD3d 562 [1st Dept 2009] [financial hardship does not excuse non-performance of a contract]; see also *Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900 [1987]; *407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275 [1968]).

Defendant further argues that summary judgment must be denied in order to conduct a factual “inquiry into whether Ruby Tuesday has done all it could have done to overcome the adverse economic forces that prevented its performance”. The Court cannot agree. As noted above, defendant has failed to offer proof in admissible form that it has been prevented from performing its Lease obligations by events outside of its control. Rather, all defendant has

shown is that changing economic conditions have made it burdensome or more difficult to perform its contractual obligations. Further, defendant's proof fails to identify the reasonable steps that it took to perform its obligation under the Lease despite the economic and financial conditions identified in the Southall affidavit or establish that the prospect of an economic downturn that might thwart its capital intensive initiative was unforeseeable.

CONCLUSION

Based on the foregoing, the Court concludes that defendant has failed to raise a triable issue of fact with respect to its defense that non-performance under the Lease was excused pursuant to the force majeure clause based on changing economic conditions. Accordingly, plaintiff is entitled to partial summary judgment on the issue of defendant's liability for breach of the Lease agreement. Further, in light of the foregoing, plaintiff has demonstrated its entitlement to an award of costs and attorney's fees as the prevailing party in this action pursuant to the Lease.

Accordingly,¹ it is

ORDERED that plaintiff's motion for partial summary judgment is granted in accordance with the foregoing

This constitutes the Decision and Order of the Court. The original of this Decision and Order is being returned to plaintiff's counsel; all other papers are being transmitted to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

¹ The Court has examined the parties' remaining arguments and contentions and finds them unavailing or unnecessary to disposition of the instant motion.

Dated: Albany, New York
May 12, 2010

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated February 9, 2010;
Affidavit of Bernard Rosenshein, sworn to February 4, 2010, with attached exhibits A-D;
Plaintiff's Statement of Material Facts, dated February 9, 2010;
Plaintiff's Memorandum of Law, dated February 9, 2010;
Affidavit of Joseph D. Daniels, sworn to March 10, 2010;
Defendant's Response and Counter-Statement of Material Facts, dated March 11, 2010;
Affidavit of Franklin E. Southall, sworn to March 10, 2010;
Affidavit of Jo Lynn Christian, sworn to March 9, 2010, with attached exhibits 1-78;
Affirmation of Robert M. Travisano, Esq., dated March 11, 2010, with attached exhibits A-M;
Defendant's Memorandum of Law, dated March 12, 2010;
Reply Affidavit of Bernard Rosenshein, sworn to April 8, 2010;
Plaintiff's Reply Memorandum of Law, dated April 9, 2010.