

2M Hospitality Group, LLC v Sahara Plaza, LLC

2024 NY Slip Op 30479(U)

January 30, 2024

Supreme Court, New York County

Docket Number: Index No. 653345/2023

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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2M HOSPITALITY GROUP, LLC,	INDEX NO.	<u>653345/2023</u>
Plaintiff,	MOTION DATE	<u>N/A</u>
- v -	MOTION SEQ. NO.	<u>001</u>
SAHARA PLAZA, LLC,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 32
 were read on this motion to DISMISS.

This action is predicated on the untenable position that the Tenant is entitled to money damages by virtue of the Landlord’s failure to permit it to reopen and otherwise prevented customers from entering the food hall under the Plaza following the lifting of the government restrictions surrounding COVID-19. This is however not actionable because pursuant to Article 63 of the Lease (NYSCEF Doc. No. 20), the parties expressly agreed that the Tenant waived any right to money damages based on the Landlord’s failure to act reasonably or otherwise defaulted in the performance of its obligations under the Lease or otherwise caused damage to the Tenant (*Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 77 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]; (*Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434, 434 [1st Dept 2009]):

63. Owner’s Conduct; Damages. Tenant hereby waives any claim for money damages (whether for consequential, incidental, punitive or other money damages, including, but not limited to lost profits) against Owner which it may have based

upon any assertion that: (i) Owner has unreasonably withheld or unreasonably delayed any consent or approval in respect of which this lease expressly provide that Owners shall not unreasonably withhold or delay its consent or approval; (ii) Owner has acted (or failed to act) unreasonably (whether or not this lease expressly requires Owner to act reasonably); (iii) Owner has acted in a manner that has caused damage to Tenant; or (iv) Owner has failed or defaulted in the performance of any term, covenant or agreement of this lease on Owner's part to be performed and Tenant agrees that its sole and exclusive remedy in all such cases, shall be an action or proceeding to enforce any such provision . . . or for specific performance, injunction or declaratory judgment

(NYSCEF Doc No. 20 at 29). As such, the lawsuit must be dismissed.

It is undisputed that the Tenant has not paid rent during its closure and, to be clear, the Landlord may not be entitled to rent because it failed to provide quiet enjoyment of the space to the Tenant as required by the Lease and a constructive eviction may have occurred.¹ This is however a shield not a sword under the circumstances (*Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996]). Nor can the alleged violation of Administrative Code of City of NY § 22-902 based on the closure of the food hall form the predicate for a claim for money damages when the parties have expressly agreed that money damages would not be available under the circumstances. For completeness, the Court notes that perhaps the Tenant is entitled to injunctive relief to require the Landlord to provide access to the demised premises as money damages are not available.

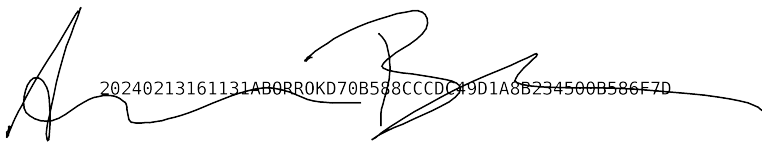
The Court also notes that the facts alleged here do not support non-enforcement of Article 63 based on *Banc of Am. Sec. LLC v. Solow Bldg. Co. II*, 47 AD3d 239 (1st Dep't 2007). In that case, Mr. Solow sought to extract a three percent fee (\$6 million) equal to Banc of America

¹ The Court notes that the court (Ostrager, J.) in a case captioned *Olma Service 21 Group, LLC, Olma XXI Inc., Igor Eliachov and Valeria Eliachov v Sarah Plaza*, Index No. 654424-2021, NYSCEF Doc. No. 62 held under facts in sum and substance substantially the same as those indicated in this case that a constructive eviction did not occur.
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Motion No. 001

Securities (BAS) overall costs of certain renovation work and advised BAS that if they didn't pay they would be in default under the lease and that, as such, the landlord would not have any further obligation to review tenant's plans or otherwise consent to their renovations. When BAS failed to pay a \$6 million invoice, BAS was served with a default notice. BAS sued seeking to have the default notices declared null and void and sought a permanent injunction barring Mr. Solow from terminating the lease and a Yellowstone injunction tolling the time to cure any default. Subsequently, on stipulation the application was withdrawn and BAS served an amended complaint seeking, among other things, consequential damages based on Solow's refusal to consent to the proposed lease. In response, Solow moved for partial summary judgment based on a lease provision which indicated that the sole remedy was specific performance. In deciding the motion, the Court indicated that Mr. Solow's three percent demand was unsupported by any lease provision and that there was no evidence indicating that Solow's actual out-of-pocket costs were anywhere near appropriate. Thus, the trial court denied summary judgment. On appeal, the Court affirmed holding that the amended complaint's allegations of Mr. Solow's \$6 million fee coinciding with its failure to approve plans resulting in pecuniary loss was sufficient to raise the issue of Mr. Solow's use of "coercion to derive a benefit not bestowed by the parties' agreement" (*id.*, at 243 [internal citations omitted]). Critically, no such benefit is alleged under the facts of this case. As such, the motion must be granted and the case dismissed without prejudice.

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendant Sahara Plaza, LLC to dismiss the complaint is granted in its entirety.



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1/30/2024

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