

**Brooklyn Events Ctr., LLC v Ludwig's Drug Store,
Inc.**

2016 NY Slip Op 30362(U)

February 29, 2016

Supreme Court, New York County

Docket Number: 653899/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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BROOKLYN EVENTS CENTER, LLC, d/b/a
BARCLAYS CENTER,

Plaintiff,

-against-

LUDWIG'S DRUG STORE, INC.,

Defendant.

Index No.: 653899/2014

Mtn Seq. No. 002

DECISION AND ORDER

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JEFFREY K. OING, J.:

Relief Sought

Plaintiff Brooklyn Events Center LLC d/b/a Barclays Center ("Barclays" or "plaintiff") moves an order, pursuant to CPLR 3212, granting summary judgment against defendant, Ludwig's Drug Store, Inc. ("Ludwig's").

Factual Background

In October of 2013, Ludwig's entered into a written three-year license agreement with Barclays for the use of a suite (the "Suite") located within the Barclays Center in Brooklyn, New York (the "License Agreement") (License Agreement, Basloe Aff., Ex. 1). Richard Mastrota, Ludwig's owner and president, signed the License Agreement (Id. at p. 2). Under the License Agreement, Ludwig's agreed to pay \$295,000 for the first year the License Agreement was in effect, \$309,750 for the second year, and

\$325,237.50 for the third year (Id. at Schedule B). The License Agreement provided that the failure to make any of these payments was a default and that, in the event of any default by Ludwig's, Barclays could, inter alia, terminate the License Agreement by written notice to Ludwig's (Id. at §§ 19[a], 20[a]). Upon the termination of the License Agreement, Ludwig's would immediately pay Barclays all remaining payments called for under the License Agreement through the end of the Term (Id. at § 20[a]). In addition, Barclays had the right to relicense the Suite to another person or entity, but was not obligated to do so (Id. at § 20[a]).

The record demonstrates that there is no dispute that while Ludwig's paid the \$295,000 due and owing for the first year of the License Agreement it made only one payment of \$77,437.50 on August 28, 2014 out of the \$309,750.00 due in the second year (Id. at ¶¶ 9, 11-12). As a result of Ludwig's default, on December 12, 2014, Barclays terminated the License Agreement by serving Ludwig's with a Notice of Termination and advised Ludwig's that "pursuant to Section 20(a) of the License Agreement, [Ludwig's] is liable for all remaining payments called for under the License Agreement through September 23, 2016" (Notice of Termination, Basloe Aff., Ex. 4).

Ludwig's did not make any other payments, but, instead, on September 26, 2014 commenced an action against Barclays alleging

that it was fraudulently induced to enter into the License Agreement (Index No. 652947/2014, NYSCEF Doc. No. 2). On January 15, 2015, this Court granted Barclays' motion to dismiss Ludwig's fraudulent inducement action with prejudice on default, and declared Barclays the prevailing party entitled to an award of attorneys' fees (Id. at Doc. No. 18). On May 8, 2015, Ludwig's motion to vacate this dismissal was denied (Id. at Doc. No. 52). On December 19, 2014, Barclays commenced the instant action asserting a claim for breach of contract, seeking the remaining amounts owed under the License Agreement and reasonable attorney's fees.

DISCUSSION

I. Summary Judgment

To establish a claim for breach of contract, the plaintiff must show "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v. Seward Park Housing Corp., 79 AD3d 425, 426 [1st Dept 2010]); Flomenbaum v. N.Y.U., 71 AD3d 80, 91 [1st Dept 2009]).

Here, Ludwig's does not dispute that it executed the License Agreement, that Barclays performed under the License Agreement, or that Ludwig's has failed to make all payments required thereunder. Instead, Ludwig's argues that summary judgment is inappropriate because it was fraudulently induced to enter into

the License Agreement. Given that this Court dismissed Ludwig's fraudulent inducement claim with prejudice on January 15, 2015, this claim is barred by res judicata and cannot serve as a defense here (Syncora Guar. Inc. v J.P. Morgan Sec. LLC, 110 AD3d 87, 92-93 [1st Dept 2013]). Accordingly, plaintiff's motion for summary judgment is granted.

II. Damages

Ludwig's argues that discovery is necessary to determine the amount of damages owed to Barclays because Barclays has failed to mitigate its damages by re-licensing or re-leasing the suite at issue. This argument is unavailing. The License Agreement clearly provides that all license fees under the License Agreement would immediately become due upon default, and that Barclays has no obligation to mitigate by re-licensing the Suite (License Agreement at § 20[a], Basloe Aff. Ex. 1). As this provision serves, in essence, as a liquidated damages clause, the question of whether plaintiff mitigated its damages is irrelevant (Am. Capital Access Serv. Corp. v Muessel, 28 AD3d 395, 396 [1st Dept 2006] [defendant not required to mitigate damage after plaintiff's anticipatory breach of employment agreement where agreement contained no-mitigation clause and severance pay provision which served as liquidated damages clause]; Crown IT Services, Inc. v Koval-Olsen, 11 AD3d 263, 266 [1st Dept 2004]; Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d

636, 639 [2d Dept 2000]). Accordingly, defendant's application for discovery is denied.

III. Attorney's Fees

The License Agreement provides for an award of attorney's fees to the "prevailing party" in any litigation arising out of the License Agreement (License Agreement at § 22, Basloe Aff. Ex. 1). Given that this Court has granted plaintiff's summary judgment motion on its sole cause of action, it is the prevailing party (Sykes v RFD Third Ave. I Assoc., LLC, 39 AD3d 279, 279 [1st Dept 2007] [to be considered a "prevailing party," one must simply prevail on the central claims advanced and receive substantial relief in consequence thereof]). Ludwig's sole argument in opposition is that the License Agreement is void and unenforceable because Ludwig's consent to same was fraudulently induced. As noted, supra, this defense is not viable in light of the previous dismissal of defendant's fraudulent inducement claims.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in the amount of \$557,500 is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment seeking an award of attorney's fees is granted, and the amount to be awarded to plaintiff is respectfully referred to a Special Referee or Judicial Hearing Officer to hear and report --

or, if the parties so-agree, to hear and determine -- the amount of reasonable attorney's fees due and owing. Plaintiff is directed, within fourteen days from the date hereof, to serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the General Clerk's Office, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/29/16



HON. JEFFREY K. OING, J.S.C.