Hylan Ross LLC v 2582 Hylan Blvd. Fitness Group, LLC
2019 NY Slip Op 33856(U)
December 2, 2019
Supreme Court, Richmond County
Docket Number: 151877/2019
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

HYLAN ROSS LLC, as successor-in-interest To BMN, LLC,

Plaintiff(s),

-against-

2582 HYLAN BOULEVARD FITNESS GROUP, LLC d/b/a PLANET FITNESS, and PFNY, LLC.

Defendant(s)

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Index No.: 151877/2019
Motion No. 1,

The following numbered 1 to 3 were fully submitted on 19th day of November 2019

	Papers Numbered
Defendant's Notice of Motion to Dismiss, with Supporting Papers and Exhibits, dated, October 15, 2019	1
Plaintiff's Affirmation in Opposition, with Supporting Papers and Exhibits, dated, November 8, 2019	2
Defendant's Reply, dated, November 15, 2019	3

Defendant moves pursuant to CPLR 3211(a)(1) and (a)(7) dismissing all claims in the Complaint. As is set forth below, defendant's motion is granted, and the complaint is dismissed.

In 2013, defendants entered a lease for premises which the then-landlord agreed to build at 2582 Hylan Boulevard. Approximately, two years after execution of the lease, the building was not yet finished. Defendants exercised their termination rights pursuant to a clause which provided:

> "Landlord hereby agrees that Landlord, at Landlord's sole cost and expense, shall obtain any and all approvals, including any all building permits, hereunder (collectively, the "Approvals") and obtain a Certificate of Occupancy (temporary or permanent[)] for the Building[.] Landlord shall have a period of eighteen (18) months after the Effective Date (the "Approval Period") to obtain the Approvals."

Four years later, plaintiff, an assignee of the original landlord, filed this action seeking, as its sole remedy, liquidated damages equal to 75% of the rent due over the ten-year lease. The cornerstone of plaintiff's case rests on the theory defendants were responsible for obtaining one or more approvals, even though the lease makes clear that this responsibility rests solely with the landlord.

The parol evidence rule, and the merger clause in the lease, bar plaintiff's attempt to rewrite the parties' agreement. Public record confirms, moreover, that the landlord did not obtain the requisite approvals until more than 40 months after the lease was signed

Plaintiff's liquidated damages claim also suffers from a host of defects. It seeks to recover substantial damages for years when the property was not built, and

no rent was due. The claim is also undercut by the fact that plaintiff successfully leased the property to another tenant and may have no damages at all. It is clearly punitive and therefore unlawful.

It is well settled that a motion to dismiss an action pursuant to CPLR 3211 (a) (7) will not be granted unless the moving papers conclusively establish that the plaintiff does not have a cause of action.

"[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v. Ginzburg,* 43 NY2d 268, 275 [1977]; *see Pacific Carlton Dev. Corp. v. 752 Pac., LLC,* 62 AD3d 677, 679 [App Div, 2nd Dept, 2009].)

Additionally, "the complaint must be liberally construed [see, CPLR § 3026] in the light most favorable to the plaintiff and all allegations must be accepted as true;" and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. However the facts alleged must fit within a cognizable legal theory (*Thomas v Thomas*, 70 AD3d 588, 590 [App Div, 1st Dept, 2010]; *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Pacific Carlton Dev. Corp. v. 752 Pac., LLC,* 62 AD3d at 679,; *see Cohn v Lionel Corp.*, 21 NY2d 559 [1968]; *Leon v. Martinez,* 84 NY2d 83, 87 [1994]; *Morone v Morone* 50 NY2d 481

[1980]; *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Gertler v Goodgold,* 107 AD2d 481, 485 [App Div, 1st Dept, 1985], *affd.*66 NY2d 946, 948 [1985]; *Goldfarb v Schwartz*, 26 AD3d 462, 463 [App Div, 2nd Dept, 2006].)

"Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; also see, *International Oil Field Supply Serv. Corp., v Fadeyi,* 35 AD3d 372, 375 [App Div, 2nd Dept, 2006].)

Affidavits may be freely received, and the court may freely consider them for the limited purpose of remedying any defects in the complaint (*see Leon v. Martinez,* 84 NY2d at 88; *Wilner v Allstate Ins., Co.,* 71 AD3d 155, [App Div, 2nd Dept, 2010]; *Fitzgerald v Federal Signal Corp.,* 63 AD3d 994, 995 [App Div, 2nd Dept, 2009].)

If a plaintiff is entitled to recovery upon any reasonable review of the stated facts, the complaint, as a pleading, is legally enough (*219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506 [1979].)

Essentially, "a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only where documentary evidence utterly refutes the complaint's factual allegations, thereby conclusively establishing a defense as a matter of law" (*see Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]; *Leon v Martinez,* 84 NY2d 83 at 88; *Kalmon Dolgin Affiliates of Long Island v Robert Plan*

Corp., 248 Ad2d 594 [App Div, 2nd Dept, 1988]; *McMorrow v Dime Savings Bank of Williamsburgh*, 48 AD3d 646, 647 [App Div, 2nd Dept, 2008]; *Aeld Associates, Inc. V Marcario*, 57 AD3d 660 [App Div, 2nd Dept, 2008]; *Newcomb v Sims*, 63 AD3d 1022, 1023 [App Div, 2nd Dept, 2009]; *Reznikov v Walowitz*, 63 AD3d 1134, 1135 [App Div, 2nd Dept, 2009].)

Further, it is well settled that a liquidated damage clause that is "grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable" (see, *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance ASS'n, Inc.*, 24 NY3d 528, 536 [2014].)

"Whether a provision in an agreement is an enforceable liquidation of damages or an unenforceable penalty is a question of law." *Id.* The purpose of a liquidated damages clause must be to "provide fair compensation," and not "to secure performance by compulsion of the very disproportion." (*see, X.L.O. Concrete Corp. v. John T. Brady & Co.*,104 AD2d 181, 183 [App Div. First Dept. 1984] aff'd 66 NY2d 970 [1985] (quoting *Truck Rent-A-Center v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977].)The party challenging a liquidated damages clause must establish either that the actual damages were "readily ascertainable" at the time the contract was entered into or that the liquidated damages were "clearly disproportionate" to foreseeable or probable losses (*see, Venitron Corp. v CF 48 Associates*, 104 AD2d 409, 409 [App Div. Second Dept, 1984]*; Central Irr. Supply v Putnam County Club*

Associates, LLC, 57 AD3d 934, 935 [App Div, Second Dept, 2008].) Both are present here.

Pursuant to the lease, tenant is liable to landlord for "all loss of rent provided herein to be paid by Tenant to Landlord." (Lease Section 24.03). This figure is readily quantifiable, as are the sums paid by any successor tenant that mitigate Plaintiff's losses. The lease, however, sets forth a formula for the calculation of liquidated damages that is not tethered to the amount of rent owed by tenant, and purports to compensate landlord for "economic damages" arising from alleged losses on other leases at the site, purportedly due to tenant's status as a "Key or Anchor Tenant." (Lease section 24.03(a)). Here, that formula results in a punitive fine for the simple reason that the building was not constructed, and could not be leased at all, for several years after the termination date.

Further, by any standard, the lease's liquidated damages clause is also conspicuously disproportionate. Tenant was not required to pay rent until the Rent Commencement Date as defined in the lease, which would not occur until after substantial completion of Landlord's work, including landlord obtaining, "all Approvals (including the Certificate of Occupancy)." (Lease section 1(q); see also id sections 1® and (xxx). Plaintiff does not allege that this occurred, such that plaintiff cannot contractually establish or prove that defendants legally owed rent. The lease formula therefore awards plaintiff a windfall and allows for double

recovery of rent from defendants and any other future tenant that may lease the premises during the ten-year term of the lease.

The magnitude of the relief sought by plaintiff in this action is astounding ($3.3 million) and speaks for itself. Plaintiff seeks the payment of rent based on the entire term of the lease, which would still be in effect today and for years to come had defendants not terminated it. Courts, refuse to enforce liquidated damages that constitute a grossly disproportionate and unenforceable penalty, as is the situation before this court, (*see, Free People of PALLC v Delshah 60 Ninth, LLC*, 169 ASD3d 622, 623 [App Div, First Dept. 2019] affirming finding that a rent credit provision in lease constitutes an unenforceable penalty); *Chatham Green Management Corp. v AAFE Management Co.*, 2003 WL 22299083 [Civ Ct, NY County, 2003] (three times the regular rent as a liquidated damages penalty for commercial holdover bears no reasonable relationship to the actual loss); *326 East 85 Realty LLC v Hairy Monk Corp.*, 46 Misc.3d 1204 (A) (Civ. Ct. NY County 2014) (holding liquidated damages amounting to 365% of the annual rental rate was certainly grossly disproportionate); *Construction by Singletree, Inc. v Lowe*, 55 AD3d 861, 864 [App Div. Second Dept. 2008]; see also *Truck Rent-A-Center*, 41 NY2d at 425.

Under similar circumstances, the Appellate Term found that a rent acceleration clause in a lease, which required payment of all rent for the remainder of the term of the machine lease, was an unenforceable penalty. *Auto-Chlor of NYC*

v Mount Fishtail, Inc., 52 Misc3d 137(A), at*2 [Second Dept. App Term. 2016].) In so holding, the court noted that this amount "was necessarily disproportionate and constituted an unenforceable penalty, if for no other reason than that it failed to include any discount to reflect the fact that [lessor] would not be providing any goods or services for the remainder of the term." The formula in the lease to calculate liquidated damages suffers from the same fatal flaw.

Therefore, the court finds that the liquidated damages clause in the lease in this action is an unenforceable penalty. The court therefore finds that the liquidated damages clause is an unforeseeable penalty and grants defendants' motion to dismiss.

This constitutes the decision and order of the court.

Dated: December 2, 2019
Staten Island, New York

Orlando Marrazzo, Jr.,
Justice, Supreme Court