Penny Port, LLC v Metropolitan Transp. Auth.
2020 NY Slip Op 30820(U)
March 18, 2020
Supreme Court, New York County
Docket Number: 161815/2015
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PENNY PORT, LLC,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, METRO NORTH COMMUTER RAILROAD COMPANY

Defendants.

INDEX NO. 161815/2015

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion for SUMMARY JUDGMENT.

This case raises the question whether a former restaurant tenant at Grand Central Station can, under the terms of its lease with MTA and Metro North, recover "lost profits" damages allegedly arising from construction work outside the terminal. The Court finds that the tenant's claims must be dismissed because the lease expressly precludes claims for lost profits damages arising out of such construction work. In addition, even if such a remedy could be permitted under the terms of the lease, the tenant's claim must be dismissed because it has not proffered competent evidence that MTA and Metro North failed to exercise "reasonable efforts" to avoid "unreasonably interfer[ing]" with the tenant's business.

Accordingly, for the reasons set forth below, the Court grants MTA and Metro North's motion for summary judgment and dismisses Plaintiff's case.

FACTUAL BACKGROUND

The Premises and Surrounding Area

Plaintiff Penny Port, LLC ("Penny Port") owned and operated "Michael Jordan's – the Steakhouse NYC" ("Michael Jordan's" or the "Restaurant") in space that Penny Port's predecessor-in-interest leased from the Metropolitan Transit Authority in Grand Central Terminal ("GCT" or the "Building") beginning in 1997.

Defendants Metropolitan Transportation Authority ("MTA") and Metro North Commuter Railroad ("Metro North") operate GCT, one of the largest and busiest railroad terminals in North America. GCT is also a destination for tourists and shoppers, and the MTA currently leases space to more than 90 retailers that cater to roughly 500,000 daily visitors and an additional 250,000 rail commuters. MTA's leasing operation raises more than $40 million annually, which is used to support Metro North's railroad operations. Defendants are responsible for the maintenance of GCT. (Defs.' Statement of Material Undisputed Facts ("SMUF"), ¶¶1-4.)

On March 13, 1997, MTA "acting by and through" Metro North executed an Agreement of Lease (the "Lease") with Penny Port's predecessor-in-interest, The Glazier Group, Inc. As the Lease makes clear, Penny Port chose to operate a restaurant in a fully operational train terminal, and sought the benefits of its central location, the beauty and grandeur of the landmark building, and the high level of commuter and tourist foot traffic. (*Id.*, ¶¶6-7.) The restaurant opened in 1998, and the Lease term ended on December 31, 2018. Penny Port relinquished the space on January 3, 2019.

The Restaurant occupied the northwest section of Grand Central's mezzanine level overlooking the Terminal's main concourse. It had a bar area on the west balcony and a dining room on the north balcony. The bar and dining area were connected by Hall A, a small space in

the northwest corner with a bank of elevators to the main concourse. Because Hall A affords elevator access to the concourse, the Lease required that Hall A be open to the public at all times that the Terminal was open. (*Id.*, ¶¶8-10.) The Restaurant used Hall A as an entry foyer and furnished the space.

The Construction Work in Dispute

This lawsuit arises from a construction project involving, among other areas, the former Taxi Stand at the Vanderbilt Avenue entrance at the west side of GCT. The construction was a multi-year effort by Metro North and the New York City Department of Transportation to replace the waterproofing that protects the train shed beneath GCT, and the main and lower levels of GCT. In addition to the familiar landmarked building, GCT consists of below-ground rails and the structure above the rails, called the train shed, which starts at the North End of the Terminal and ends at 57th Street, between Lexington Avenue and Madison Avenue. Their underground location's structure is especially susceptible to leaks from the roadbed above.

The work involved lifting up the pavement on several streets surrounding the Terminal, including the Taxi Stand area, replacing the waterproof layer underneath the pavement, and repaving the Taxi Stand and street. The construction was critical to maintaining the long-term operation of the railroad. In particular, the waterproofing work in the Taxi Stand was necessary to protect the portion of the Main Concourse of the Terminal that sits directly below the Taxi Stand, which includes retail stores and passageways for commuters and customers. (Defs.' SMUF, ¶¶30-32.)

On July 18, 2014, GCT Tenants (including Michael Jordan's) received a memorandum stating that Metro North and the Department of Transportation "have begun a Leak Remediation Project," which was "expected to run intermittently over the next 30 months." The notice further

stated: "We understand this may cause inconveniences, but this project is imperative to the long-term efficient operations of Grand Central Terminal." Lipton Aff., Ex. G. Penny Port acknowledges receiving the memorandum but notes that it did not state that the project would affect Michael Jordan's, "as it did not specify where in GCT the [Leak Remediation Project] would be performed." (Pl.'s Response to Defs.' SMUF, ¶33.)

Construction began in the Taxi Stand in November 2014, when workers erected temporary barricades that cordoned off a section of the north half of the Taxi Stand. The barricades were water-filled plastic orange and white construction barriers topped with a chain link fence that was, at times, covered with sound dampening blankets. Although Defendants contend the barricades did not block access to the main terminal onto the Vanderbilt Avenue balcony doors or Hall A, Penny Port contends that the barricades did in fact "significantly impede[]" access to the Hall A entrance as well as the main terminal entrance." (Pl. SMUF, ¶38.) Similarly, while Defendants contend that the barricades did not obscure the view of Michael Jordan's branded awnings, Penny Port contends that the barricades (as well as a dump truck parked outside as a "makeshift security measure") did in fact obscure the awnings from view. (*Id.*, ¶39.)

The construction involved removing the small paving stones from the former roadway, applying the new waterproofing, and then replacing the paving stones. The barricades were installed to keep pedestrians a safe distance from the work and to contain any dust from the construction. The site layout was designed in consultation with representatives from Metro North's security department and fire brigade, among others. The barriers were at times draped with sound-dampening blankets to lessen construction noise in the neighborhood. (Defs.' SMUF, ¶¶40-44).

Key Terms in the Lease

The Lease referred to the space demised to Penny Port as the "Premises," and defined the "Building" as:

> Grand Central Terminal, located at Vanderbilt, Park and Lexington Avenues and 42nd Street in the City and State of New York, together with the columns, footings, supports, foundations and other members and structures supporting said building, together with all improvements now or hereafter located therein, and all systems, fixtures and equipment use in or necessary to the operation thereof.

(Lease, §2.2.)

The Lease includes several provisions that address potential construction work that might affect Penny Port's business and the available remedies in the event such work interferes with Penny Port's business. Most directly on point is section 15.3, which provides in full:

> **Work in Building**. Tenant acknowledges that Landlord may (but shall not be required to) substantially renovate portions of the Building outside of the Premises. Tenant further acknowledges that from time to time, throughout the term of this Lease, **Landlord will be performing construction work in and about the Building and, at times, such construction work may result in noise and disruption to Tenant's business.** Landlord reserves the right, at any time, without it being deemed a constructive eviction and without incurring any liability to Tenant therefor, or affecting or reducing any of Tenant's covenants and obligations hereunder, to make or permit to be made such work and any other changes, alterations, additions, repairs and improvements in or to the Building and the fixtures and equipment thereof, as well as in or to the street entrances, doors, halls, passages, elevators, escalators and stairways thereof , and other public parts of the Building, as Landlord shall deem necessary or desirable and to restrict or prohibit access thereto (and to the Premises) in connection with any such work, changes, alterations, repairs, additions and/or improvements. Without limiting the generality of the foregoing, in connection with such work Landlord may erect scaffolding, and restrict access to the elevators, lobby, or other common areas, of the Building. In addition to and without limiting any provision of this Lease, **Tenant agrees that Landlord shall not be liable for, and Tenant expressly waives and releases Landlord and the Indemnitees (as defined below) from, any liability and any and all claims Tenant may have against such parties for any loss, injury or other damage to person and property, including without limitation, lost profits or business losses, and any and all consequential damages, arising or alleged to be arising as a result of any such construction or other work activity or other changes, alterations, additions, repairs and improvements conducted by Landlord or Landlord's agents.**

(*Id.*, §15.3. (emphasis added)).

Penny Port asserts that, while the MTA is entitled to disrupt Tenant's business while performing work authorized under the Lease, section 2.3.4 of the Lease requires that it perform such work with "reasonable efforts . . . to not unreasonably interfere with the reasonable operation of Tenant's business in the Premises":

> Landlord shall **use reasonable efforts** to (i) conduct any entry into the Premises permitted under this lease, and (ii) perform any work performed by Landlord pursuant to the terms hereof (including any work necessary to alleviate or minimize the duration of any stoppage or interruption of Building services) and otherwise exercise Landlord's rights pursuant to this Section 2.3, in a manner so as **to not unreasonably interfere with the reasonable operation of Tenant's business in the Premises**. . . . If any work to be performed by Landlord in or about the Premises or in the common areas adjacent to the Premises are reasonably likely to materially interfere with Tenant's conduct of business in the Premises, Landlord shall, prior to the commencement of such work … notify Tenant … of Landlord's intention to perform such work and of the likely duration of such work.

(*Id.*, §2.3.4 (emphasis added).) Penny Port argues that the did not use the required reasonable efforts to avoid unreasonably interfering with Penny Port's business

As reflected in the language quoted above, the Lease specifically limits Defendants' liability for certain damages arising from construction work "in and about the Building." Specifically, section 15.3 provides that, "[i]n addition to and without limiting any provision of this Lease, Tenant agrees that **Landlord shall not be liable for,** and Tenant expressly waives and releases Landlord . . . from, any liability and any and all claims Tenant may have against such parties for any loss, injury or other damage to person and property, including without limitation, **lost profits or business losses, and any and all consequential damages, arising or alleged to be arising as a result of any such construction or other work activity or other changes, alterations, additions, repairs and improvements conducted by Landlord or Landlord's agents.**" (*Id.* at § 9) (emphasis added). Penny Port reads this portion of the Lease

as not limiting the scope of damages arising out of a breach of the Landlord's obligations under Section 2.3.4 because it includes the phrase "in addition to and without limiting any provision of this Lease."

The parties have not provided any extrinsic evidence with respect to contemporaneous drafts or communications between the parties at the time the Lease was negotiated and signed.

Penny Port's Claims

Although Defendants maintain that the construction was done in a manner to minimize disruption to GCT and the surrounding area, Penny Port vehemently disagrees. Shortly after the barricades were erected in the north half of the Taxi Stand, in November 2015, Penny Port's management raised complaints about the construction to the MTA and the MTA's tenant management company. Among other things, Penny Port complained that the construction barricades reduced the Restaurant's visibility and attracted homeless people to the Taxi Stand, that construction workers gathered in the Premises, and that the Restaurant suffered a decline in sales as a result.

Penny Port claims that customers were bothered by the construction but has produced no evidence of any customer complaints. Although contemporaneous "end of shift" reports from Penny Port's managers reflected periodic customer complaints about other issues (food, service, etc.), none of the reports noted customer complaints with respect to the construction work. Nor did customer reviews on Yelp, Trip Advisor or Open Table. That said, Penny Port alleges that it suffered $1.98 million in lost profits as a result of Defendants' breach of its obligations under the Lease.

Penny Port filed the instant action in November 2015, asserting six causes of action: (1) breach of contract ; (2) breach of the duty of good faith and fair dealing; (3) nuisance; (4)

trespass; (5) negligence; and (6) the violation of its First Amendment rights by allegedly retaliating against Penny Port for initiating this lawsuit. As noted above, Penny Port is seeking $1.98 million in lost profits. Defendants moved for summary judgment dismissing all of Penny Port's claims. In its opposition to Defendants' motion, Penny Port stated that it was not opposing the motion as to the second, third, fourth, fifth, and sixth causes of action. What remains before the Court is Penny Port's claim for breach of contract.

DISCUSSION

A party moving for summary judgment must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence "sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324.

A. Penny Port's Claim is Barred by the Express Terms of the Lease

Section 15.3 of the Lease broadly, explicitly, and unambiguously, bars claims for lost profits due to construction work of the type involved here. "[C]ontractual limitations upon remedies are generally to be enforced unless unconscionable." *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 403 (1968); *see Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 22 N.Y.3d 799, 805 n.4 (2014) ("Contract provisions limiting remedies are enforceable unless they are unconscionable."). Penny Port acknowledged in the Lease that the MTA may need to "substantially renovate portions of the Building outside of the Premises" and that the MTA would "be performing construction work "in and about the building" that "may result in

noise and disruption to [Penny Port's] business." And Penny Port "agree[d]" that the MTA would "not be liable for . . . lost profits or business losses, and any and all consequential damages, arising or alleged to be arising as a result of any such construction or other work activity . . . ." These kinds of liability-limiting contract provisions are enforced by New York courts. *See, e.g.*, *Zmoore, Ltd. v. Kingman Mgmt. LLC*, 154 A.D.3d 603, 604 (1st Dep't 2017); *see also Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 286 A.D.2d 258, 260 (1st Dep't 2001); *Bd. of Managers of Saratoga Condo v. Shuminer*, 148 A.D.3d 609, 610 (1st Dep't 2017); *Scott v. Palermo*, 233 A.D.2d 869, 876 (4th Dep't1996).

Penny Port's reliance on Section 2.3 of the Lease is unavailing. *First*, the section by its terms does not apply to the construction work at issue. Instead, it covers a narrow and specific range of work items, which may impact the Premises:

> (i) install, use, maintain, repair, replace and relocate shafts, pipes, ducts, conduits, wires, risers and other facilities and appurtenant fixtures in the Premises or in other parts of the Building" and "alter or relocate any other common facility, whether located in the Premises or in other parts of the Building" (Lease, § 2.3.1(a)-(b)); and
>
> (ii) erect, install, replace and remove any structures and/or decorative items in the Building and in any other common areas, spaces and facilities in or about the Building

(Lease, §2.3.2.) Fairly construed, these items of work do not encompass the leak remediation work in the Taxi Stand – which involved substantial construction outside the Premises – and thus Section 2.3.4(a) does not apply.

Second, even if some or all of the leak remediation project fit within the type of work identified in Sections 2.3.1 and 2.3.2, Section 15.3's comprehensive prohibition against claims for lost profits still bars Penny Port's claim. The two sets of provisions are easily harmonized. *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura*

Credit & Capital, Inc., 30 N.Y.3d 572, 581 (2017) ("[C]ourts should read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent."). Section 15.3 protects the MTA from liability for business loss incurred by Penny Port arising from "construction work . . . in and about the Building," which is what took place here. While one might conclude that the construction work falls to some extent within the definitions of *both* section 15.3 and 2.3.4, and thus that there was an obligation to use "reasonable efforts" under 2.3.4, the language of 15.3 is more specific and makes clear that the tenant cannot sue for lost profits. The tenant's remedies are limited to injunctive relief and rent abatement, neither of which Penny Port sought or is seeking.

Although Penny Port seeks to minimize the import of section 15.3 as "boilerplate," it is easy to understand why Defendants would insist on such express limitations on liability. With almost 100 tenants, Defendants (which are public entities) could be subject to unpredictable and virtually limitless "lost profits" liability arising from construction projects that tenants expressly were warned would take place, based on allegations that third-party contractors failed to use "reasonable efforts" to avoid unreasonably interfering with some or all of the tenants' businesses. Even assuming section 15.3 was "boilerplate," and there is no evidence in the record to suggest that is an accurate characterization, it is still a binding term of the Lease.

B. Penny Port Fails to Proffer Competent Evidence that MTA Failed to Exercise Reasonable Efforts

Alternatively, even putting aside the contractual bar against claims for lost profits, Penny Port has not offered evidence to show that Defendants breached Section 2.3.4 by failing to use "reasonable efforts to . . . not unreasonably interfere with the reasonable operation of [the Restaurant]." Penny Port offers no evidence on that standard of care, leaving a fact finder with no way to assess whether that standard was breached, or to tie any breach of such standard to any

of the damages sought. *See Empire Room, LLC v. Empire State Bldg. Co. LLC*, 159 A.D.3d 648, 649 (1st Dep't 2018) ("Viewing the evidence in the light most favorable to plaintiff, it has failed to raise an issue of fact as to whether defendant made commercially reasonable efforts . . . . As such, defendant is entitled to summary judgment dismissing this part of the breach of lease claim.").

While Penny Port offers photographs and descriptions of "disgusting conditions" at the Restaurant once construction began, it offers no testimony addressing the standard of care that should be applied in determining whether Defendants used "reasonable efforts" to avoid those disruptions. For example, Penny Port offers no testimony from a construction expert that could permit a finder of fact to determine what precautions could have been – but were not – taken to avoid the disruption to Penny Port's premises based on the specific construction work being done. The fact that the construction caused disruption does not mean that the work was carelessly done. Penny Port's proposed evidence from its owners, supplemented by photographs of the scene, would not permit a fact finder to make a determination the Defendants failed to use "reasonable efforts" to avoid unreasonable disruption. *See Farrell v. Rose*, 253 N.Y. 73, 80 (1930) (dismissing plaintiff's case against city and contractor for unreasonable construction delays where he failed to "prove by the testimony of [a witness] familiar with this class of work and with the situation . . . that the delay was unreasonable and unnecessary," noting that "merely the fact of delay" was insufficient evidence); *J.J. Johnson Rest., Inc. v. City of N.Y. Dep't of Envtl. Prot.*, 216 A.D.2d 359, 359 (2d Dep't 1995) ("The plaintiff failed to produce evidence from an expert in road construction that the project in question was unreasonably or unnecessarily delayed.") (affirming grant of summary judgment).

By contrast, Defendants proffered the testimony of Mr. Hall, Metro North's project manager for the leak mediation project, who described the mediation work and defended the manner in which it was performed. While such testimony on behalf of a party may not, by itself, be sufficient to obtain summary judgment in all cases, the fact remains that in this case Penny Port has offered *no* evidence from anyone familiar with construction to rebut Mr. Hall's testimony or otherwise create a material fact dispute as to its breach of contract claim. Indeed, in response to Defendants' Statement of Material Facts, Penny Port "does not dispute" a number of key assertions made by Defendants about the construction work: that "[t]he construction was critical to maintaining the long-term operation of the railroad," that "[t]he site layout was designed in consultation with representatives from Metro-North's security department and fire brigade, among others," that the construction barriers "adhere[d] to all applicable regulations," and that Penny Port "has produced no evidence of any customer complaints" regarding the construction. (Pl.'s Response to Defs.' SMUF, ¶¶31, 37, 42, 54, 58-59.)

Penny Port's only proposed expert testimony is from a forensic accountant, who calculated the financial damage wrought by Defendants' construction work. "[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim," and "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman*, 49 N.Y.2d at 562.

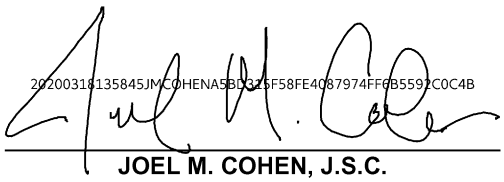
In the absence of evidence from which a finder of fact could evaluate the reasonableness of the sprawling construction project at issue here, Penny Port's breach of contract claim must be dismissed.

* * * *

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is **Granted.** The Clerk is directed to enter Judgment accordingly in favor of Defendants.

This constitutes the Decision and Order of the Court.



3/18/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE