

**Backal Hospitality Group LLC v 627 W. 42nd Retail  
LLC**

2020 NY Slip Op 32538(U)

August 3, 2020

Supreme Court, New York County

Docket Number: 154141/2020

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 154141/2020

BACKAL HOSPITALITY GROUP LLC, CANVAS EVENTS  
LLC, and ARTHUR BACKAL,

Plaintiffs,

**MOTION SEQ. NO.** 001

- v -

627 WEST 42ND RETAIL LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In this action for declaratory and injunctive relief, plaintiffs Backal Hospitality Group LLC, Canvas Events LLC, and Arthur Backal, move, by order to show cause, for an order directing defendant 627 West 42nd Retail, LLC to refund the entire value of a letter of credit to plaintiffs or, in the alternative, directing defendant to post a bond in the amount of the letter of credit for the benefit of plaintiffs pending the final resolution of this matter. Defendant opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the application is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On June 28, 2018, plaintiff Canvas Events, LLC (“Canvas”), a caterer, leased from defendant 627 West 42nd Retail, LLC (“627”) the ground floor and lower level storage unit located at 635 West 42nd Street, New York, New York (“the premises”), which was to be used as an event

space. Concomitantly with the execution of the lease, Canvas deposited \$500,000.00 in cash with 627 as a security deposit. Doc. 4 at 40-41, par. 34.1. Plaintiff Arthur Backal (“Backal”), a managing member of Canvas, also executed a Good Guy Guaranty of the Lease. Doc. 4 at 47, 54-58. The lease provided, inter alia, that “[n]o agreement to accept a surrender of all or any part of the Demised Premises shall be valid unless in writing and signed by [627]” and that “[t]he delivery of keys to an employee of [627] or of its agent shall not operate as a termination of this [l]ease or a surrender of the Demised Premises.” Doc. 4 at par. 28.2(A). Additionally, paragraph 25.3 of the lease provided, inter alia, that if plaintiff defaults, 627 “shall be entitled to retain all moneys, if any, paid by [Canvas] to [627], whether as advance rent, security or otherwise, but such moneys shall be credited by [627] against any Fixed Rent or Additional Rent due from [Canvas] at the time of such termination or re-entry [by 627] or, at [627’s] option, against any damages payable by [Canvas] . . .” Doc. 4 at par. 25.3. Paragraph 26.1 of the lease required Canvas to pay 627 any rent which came due after it vacated the premises due to a default. Doc. 4 at par. 26.1.

On September 10, 2018, plaintiff Backal Hospitality Group, LLC (“BHG”), on behalf of Canvas, and for the benefit of 627, established a letter of credit (“LOC”) in the amount of \$500,000.00 with JPMorgan Chase Bank, N.A. (“JPMorgan”). Doc. 5. In accordance with paragraph 34.1 of the lease, the letter of credit replaced the cash provided by Canvas as security for the lease. Doc. 4 at par. 34.1. Paragraph 34.1 of the lease also allowed 627 to draw upon the LOC in the event Canvas breached the lease by failing to pay 627 any amounts owed. *Id.* Paragraph 34.2 of the lease provided that Canvas “shall not seek to enjoin, prevent or otherwise interfere with [627’s] draw against the [LOC].” *Id.* at par. 34.2.

On March 22, 2020, New York State Governor Andrew Cuomo issued an executive order which, inter alia, banned large gatherings at all facilities in New York State of New York due to the COVID-19 epidemic (“the March 22 order”).

Because the March 22 order prevented Canvas from operating as an event space, and thus rendered it unable to pay future rent, its attorney wrote to a representative of 627 on May 27, 2020 purporting to confirm a telephone conversation counsel had with the representative earlier that day during which, counsel claimed, they purportedly agreed that Canvas would vacate the space and that the lease would be terminated. Doc. 8. The same day, counsel for plaintiffs wrote to JPMorgan to advise that the lease had been terminated and requested instructions regarding how to terminate the LOC. Doc. 6. On May 28, 2020, counsel for 627 wrote to counsel for plaintiffs to advise that 627 “in no way agreed to terminate the [l]ease” and that it reserved all of its rights pursuant to the lease and otherwise. Doc. 8.

JPMorgan responded on June 4, 2020 by advising Backal that the LOC could only be cancelled with the consent of its customers, BHG and Canvas, and the beneficiary, 627. Doc. 7.

On June 10, 2020, 627 filed paperwork with JPMorgan to draw down on the LOC in order to satisfy outstanding rental arrears due through June, 2020 in the sum of \$413,161.19. Doc. 13 at par. 27. 627 received these funds from JPMorgan the following day. Id.

On June 10, 2020, plaintiffs commenced the captioned action by filing a summons with notice seeking: 1) a declaration that the lease has been terminated; and 2) an order “permanently enjoining [627] from preventing [p]laintiffs from canceling the [LOC] that secures the lease.” Doc. 1.

Plaintiffs thereafter filed the instant OSC seeking an order directing 627 to refund the entire value of the LOC to plaintiffs or, in the alternative, directing 627 to post a bond in the amount of

the LOC for the benefit of plaintiffs pending the final resolution of this matter. Docs. 2-12. The OSC, signed June 23, 2020, contained a temporary restraining order (“TRO”) preventing 627 from further drawing upon the LOC and enjoining 627 from using or transferring any of the funds it had already drawn down pending the hearing of the OSC. Doc. 12. In support of the motion, Kelly Robreno Koster, Esq., counsel for plaintiffs, argues that plaintiffs are entitled to injunctive relief since they are likely to succeed on the merits, they will suffer irreparable harm if the relief demanded is not granted, and because the equities weigh in their favor. Doc. 3. Koster asserts that plaintiffs are likely to succeed on the merits since their surrender of the premises, combined with 627’s acceptance of the keys, establish that 627 allowed plaintiffs to terminate the lease without any penalty. Doc. 3 at par. 40. They further assert that they will be irreparably harmed if they are not granted the relief they seek since they will be unable to return the deposits their clients made in connection with parties planned at the premises. Doc. 3 at par. 55. They assert that the equities favor them for the same reason. Doc. 3 at par. 57. Additionally, Koster argues that it is impossible for plaintiffs to perform under the lease given the March 22 order prohibiting large gatherings. Doc. 3.

In an affidavit in support of the OSC, Backal represents, inter alia, that: 1) he is the principal of Canvas and BHG as well as the guarantor of the lease; 2) the majority of events plaintiffs had planned at the premises have been cancelled due to the COVID-19 pandemic and that plaintiffs cannot refund the deposits made by their clients unless they have access to the funds securing the LOC; 3) 627 agreed to terminate the lease without any penalty and that plaintiffs would not have terminated the lease unless it was without penalty; 4) 627 accepted the keys after plaintiffs advised that they were terminating the lease; and 5) plaintiffs will suffer irreparable harm if plaintiffs

cannot access the funds securing the LOC since they will not be able to refund their clients' deposits. Doc. 10.

In an affirmation in opposition, Andrew Plotkin, Esq., Executive Vice President and Associate General Counsel of Josephson, LLC ("Josephson"), the asset manager of 627, states, inter alia, as follows: 1) on April 21, 2020, 627 delivered a notice of default to Canvas after Canvas failed to pay March and April 2020 rent and additional rent in the amount of \$204,983.36; 2) plaintiffs thereafter requested a lease modification as a result of the COVID-19 pandemic; 3) the parties thereafter entered into negotiations regarding a possible lease modification; 4) despite the discussions about a possible lease modification, 627 never agreed to allow Canvas to vacate the premises without any penalty since doing so could have resulted in a waiver by 627 of hundreds of thousands of dollars in rent arrears, \$10 million in future rent, and the return of the \$500,000 LOC; 5) pursuant to paragraph 28.2(A) of the lease, plaintiffs could not surrender the premises without the written consent of 627, which was not granted, and that paragraph specifically states that the mere acceptance of the keys by 627 did not operate as a surrender of the premises or as a termination of the lease; 6) paragraph 34.1 allows 627 to draw upon the LOC in the event plaintiffs fail to pay their rent; 7) plaintiffs never responded to 627's May 28, 2020 correspondence reserving its rights under the lease; and 8) paragraph 34.2 of the lease prevented plaintiffs from seeking to "enjoin, prevent or otherwise interfere with [627's] draw against the [LOC]." Doc. 13.

In an affidavit in opposition, Kimberly Cafaro, managing agent for Josephson, corroborates Plotkin's representations about the default notice served on Canvas, the negotiations regarding a possible lease modification, the fact that 627 never agreed to allow Canvas to terminate the lease without a penalty, and the fact that plaintiffs never objected to Plotkin's correspondence of May

28, 2020. Doc. 14. She further states that 627 received the keys to the premises from plaintiffs on June 4, 2020. Doc. 14.

Scott F. Loffredo, Esq. of Belkin Burden Goldman LLP, counsel for 627, also submits an affirmation in opposition to the OSC. Doc. 15. Loffredo argues that plaintiffs are not entitled to a preliminary injunction since they have failed to establish the likelihood of success on the merits, irreparable harm, and that the equities herein weigh in their favor. *Id.* Specifically, he argues that plaintiffs fail to establish their likelihood of success on the merits because they have provided no evidence that the parties agreed to an early termination of the lease or a waiver of all rent due and maintains that: 1) paragraph 34.1 of the lease required that Canvas obtain a LOC in order to secure its performance under the lease, and that 627 was permitted to draw upon the LOC in the event of a breach by Canvas; 2) paragraph 34.2 of the lease prohibited Canvas from enjoining, preventing or interfering with any drawing upon the LOC by 627; 3) paragraph 28.2(A) of the lease prohibited Canvas from surrendering the premises without written approval from 627 and stated that the mere acceptance of the keys by 627 did not operate as a termination of the lease; 4) paragraph 25.3 of the lease permitted 627 to retain any moneys paid by Canvas to 627, whether as advance rent, security or otherwise, so long as such moneys shall be credited by 627 against any rent arrears; and 5) paragraph 26.1 of the lease required Canvas to pay any rent after it vacated the premises due to a default. Thus, asserts Loffredo, plaintiffs clearly do not establish a likelihood of success on the merits.

Loffredo further asserts that plaintiffs fail to establish irreparable harm because they can be compensated by monetary damages.

Finally, Loffredo asserts that the equities do not weigh in plaintiffs' favor since they made a settlement offer to 627 on June 10, 2020 despite simultaneously arguing that 627 had agreed to plaintiffs' early termination and a waiver of its arrears.

#### LEGAL CONCLUSIONS:

“A preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party.” *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the broad discretion of the court. *See Madden Int'l., Ltd. v Lew Footwear Holdings Pty Ltd.*, 143 AD3d 418 (1<sup>st</sup> Dept 2016); *Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc.*, 142 AD3d 873 (1<sup>st</sup> Dept 2016).

Here, plaintiffs have clearly failed to establish the likelihood of their success on the merits. Although they assert that 627 agreed to terminate their lease without any penalty, this contention is unsupported by any evidence. On the contrary, as 627 asserts, counsel for 627 wrote to plaintiffs' counsel on May 28, 2020 stating that 627 “in no way agreed to terminate the [l]ease” and that it reserved all of its rights pursuant to the lease and otherwise. Doc. 8.

The lease clearly provided that “[n]o agreement to accept a surrender of all or any part of the [premises] shall be valid unless in writing and signed by [627].” Since plaintiffs have produced no such writing, their contention that they legally surrendered the premises is without merit. Additionally, plaintiffs' argument that 627 assented to Canvas' surrender of the premises by accepting the return of the keys is belied by the provision of the lease providing that “[t]he delivery

of keys to an employee of [627] or of its agent shall not operate as a termination of this [I]ease or a surrender of the [premises].” Doc. 4 at par. 28.2(A). Despite the fact that Canvas vacated the premises, it was still liable to pay its arrears, as well as other amounts due under the lease, and 627 was permitted by the lease to draw down the LOC for this purpose. Doc. 4 at pars. 25.3, 26.1, 34.1, 34.2.

Plaintiffs further contend that they are likely to succeed on the merits because the March 22 order prohibiting large gatherings of people rendered it impossible for them to perform under the lease. However, in making this argument, plaintiffs overlook paragraph 36.4 of the lease, which provides that:

If the fixed rent or any additional rent shall be or become uncollectible by virtue of any law, governmental order or regulation, or direction of any public officer or body, Tenant shall enter into such agreement or agreements and take such other action (without additional expense to Tenant) as Landlord may request, as may be legally permissible, to permit Landlord to collect the maximum Fixed Rent and Additional Rent which may, from time to time during the continuance of such legal rent restriction be legally permissible, but not in excess of the amounts of fixed rent or additional rent payable under this Lease. Upon the termination of such legal rent restriction, (a) the Fixed Rent and Additional Rent, after such termination, shall become payable under this Lease in the amount of the Fixed Rent and Additional Rent set forth in this Lease for the period following such termination, and (b) Tenant shall pay to Landlord, if legally permissible, an amount equal to (i) the Fixed Rent and Additional Rent which would have been paid pursuant to this Lease, but for such rent restriction, less (ii) the Fixed Rent and Additional Rent paid by Tenant to Landlord during the period that such rent restriction was in effect.

Doc. 4 at par. 36.4.

Although the parties do not raise this provision in the motion papers, they evidently contemplated a scenario in which performance of the lease terms by plaintiffs might become prohibited by a governmental order, and agreed that, if such a situation arose, they would reach an

agreement regarding the collection of rent at the conclusion of the governmental restriction. Although the parties attempted in vain to negotiate a lease modification, plaintiffs nevertheless attempted to unilaterally terminate the lease in a manner violative of the terms thereof.

Given this finding, it is not necessary to address the other two requirements for obtaining a preliminary injunction. In any event, however, plaintiffs have also failed to establish irreparable harm and a balancing of the equities in their favor. Although plaintiffs claim that they will be irreparably harmed if they are not immediately able to access the funds that secure the LOC since those funds are “earmarked for refunds to [Canvas’] clients and far exceed any colorable damages [627] could claim it is owed” (Doc. 3 at par. 55), this claim is utterly conclusory insofar as plaintiffs submit no proof whatsoever of the amounts owed to their clients. Plaintiffs’ claim that 627 will suffer no prejudice in the event its application is granted “because it has already surrendered the [p]remises to [627] in compliance with their agreement to terminate the [l]ease without penalty” (Doc. 3 at par. 58) is specious given the analysis above. Finally, plaintiffs’ claim that any damages owed to 627 “are far less than the value of [627’s] withdrawal due to [p]laintiffs’ surrender of the [p]remises and [627’s] duty, and failure, to mitigate” is baseless since, as noted above, no proof of any such damages has been submitted to this Court.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Backal Hospitality Group LLC, Canvas Events LLC, and Arthur Backal is denied in all respects; and it is further

ORDERED that defendant 627 West 42nd Retail, LLC shall serve this order, with notice of entry, on all parties, within 20 days after the filing of this order on NYSCEF; and it is further

ORDERED that defendant's time to serve a demand for a complaint is extended until 20 days after the filing of this order with notice of entry: and it is further

ORDERED that the TRO entered by this Court on June 25, 2020 is vacated; and it is further

ORDERED, that counsel for the parties are directed to participate in a preliminary conference by telephone on November 2, 2020 at 10:30 a.m. (the parties must provide the court with a dial-in number and access code prior to the conference or must all be on the line and then patch the court in); and it is further

ORDERED that this constitutes the decision and order of the court.

8/3/2020  
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: