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| Tabor v 148 Duane LLC |
| 2020 NY Slip Op 33738(U) |
| November 10, 2020 |
| Supreme Court, New York County |
| Docket Number: 156655/2018 |
| Judge: Barbara Jaffe |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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INDEX NO. 156655/2018

TIMOTHY TABOR, AKIKO TABOR,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 004

- v -

148 DUANE LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 158-191 were read on this motion to extend stipulation deadline.

By order to show cause, defendant seeks an order staying, tolling or extending, without penalties, the previously stipulated deadline by which they are required to complete certain repairs and renovations to the building and apartment in which plaintiffs reside. Plaintiffs oppose.

On August 1, 2019, the parties stipulated on the record that plaintiffs would relocate from their apartment for 12 months, with defendant covering the costs of plaintiffs' relocation, including paying up to \$25,000 a month for comparable housing less the amount of plaintiffs' current rent. As pertinent here, the parties also agreed that "[i]n the event that the relocation needs to be extended beyond the twelve-month period because the [defendant] failed to complete the construction within that time period there will be a per-diem penalty of \$500 per day without prejudice to the [plaintiffs] seeking additional remedies before this Court." The parties clarified that the penalty applies if the building's essential services, defined as those that make the apartment habitable, are still out. (NYSCEF 161).

Defendant contends that due to the COVID-19 health crisis and resulting restrictions, it is impossible for defendant to complete the work legally and safely within the stipulated period. It agrees to continue paying plaintiff's relocation costs until the completion of the work, but maintains that it should not be required to pay the per diem penalty, as the unanticipated COVID-19 restrictions caused the delay and the court has discretion to modify the stipulation. It further observes that the parties' original lease provides:

INABILITY TO PROVIDE SERVICES: Because of a strike, labor trouble, national emergency, repairs or any other cause beyond Owner's reasonable control, Owner may not be able [sic] provide or may be delayed in providing any services or in making nay repairs to the building. In any of these events, any rights You may have against Owner are only those rights which are allowed by laws in effect when the reduction in service occurs. Owner is not required to provide any service besides those specifically written in this Lease. Owner may provide additional services and You will not be entitled to a reduction in rent.

(NYSCEF 167).

Defendant submits the affidavit of the senior vice president of the managing agent of the building located at 148 Duane Street in Manhattan in which he states that he is the project manager for the repairs and renovations at the building and plaintiffs' apartment. He alleges that on March 22, 2020, construction stopped due to the issuance of executive orders in response to the COVID-19 pandemic. Likewise, he states, on April 2, 2020, the Department of Buildings (DOB) issued a notice that all work on non-essential construction was suspended. Defendant applied for permission from the DOB to continue work on the building, and on April 28, 2020, defendant obtained a certificate of authorization, permitting work of a limited scope to continue. (NYSCEF 171). He asserts, however, that restrictions have slowed down construction, as defendant must maintain physical distancing which limits the amount of people in confined spaces. Defendant's COVID-19 reopening safety plan, which was filed with the DOB, provides that only one individual may work in any confined space, that workers who fail to comply with

mask and glove regulations will be removed from the premises, and that alternate crews would be employed to reduce group sizes. (NYSCEF 172). He also contends that the work would have been completed but for the COVID-19 restrictions, and that it will be impossible to restore the building and apartment to a habitable condition until “approximately early next April.” However, he maintains, additional time may be required should additional COVID-19 restrictions be issued. (NYSCEF 168).

In opposition, plaintiffs contend that they do not oppose defendant’s request for an extension of the time to complete the work, but seek the continued payment of the rental difference for the plaintiffs’ relocation apartment for a one-year renewal period and the payment of the per diem penalties provided in the stipulation. They observe that the stipulation does not provide for excuses or exceptions to the imposition of a penalty, and that construction was halted from March 22, 2020 until April 28, 2020. Plaintiffs contend that the delay in construction is not solely due to the COVID-19 pandemic, but also to the imposition of a mechanic’s lien following defendant’s failure to pay construction-related vendors. They deny that the penalty provided for in the stipulation is obviated by plaintiffs’ lease, and contend that a hearing, if necessary, would reveal that there is no legitimate excuse for seeking a waiver of the penalty. Without the penalty, plaintiffs argue, defendant will further delay completion of the work. (NYSCEF 190).

Given the issues of fact concerning whether defendant’s failure to complete the work within the time period provided in the stipulation is excused, a hearing is necessary to determine whether the imposition of \$500 per diem penalty is warranted.

Accordingly, it is hereby

ORDERED, that that the application is held in abeyance pending a hearing on the issues detailed above; and it is further

ORDERED, that the parties are directed to contact the court jointly by email to cpaszko@nycourts.gov to schedule the hearing which, given the COVID-19 pandemic, will be held remotely.

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BARBARA JAFFE, J.S.C.

11/10/2020
DATE

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input checked="" type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |
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