

RPH Hotels 51st St. Owner, LLC v HJ Parking LLC
2021 NY Slip Op 30286(U)
January 28, 2021
Supreme Court, New York County
Docket Number: 654938/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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RPH HOTELS 51ST STREET OWNER, LLC

Plaintiff,

- v -

HJ PARKING LLC,

Defendant.

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INDEX NO. 654938/2020

MOTION DATE 01/25/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 22, 23, 24

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The motion by defendant to vacate the default judgment entered against it (as to liability only) is denied.

Background

In this commercial landlord tenant case, defendant seeks to vacate the Court's decision dated December 11, 2020 in which plaintiff was awarded a default judgment on liability (NYSCEF Doc. No. 12).

Defendant claims that its operations (a parking garage) have faced severely declining revenue and increased costs associated with the ongoing global pandemic. It points out that it is an essential business and is located in the heart of Times Square. Defendant complains that plaintiff moved too quickly for a default judgment and sought relief only 11 days after the deadline for defendant to answer the complaint. Defendant insists it has both a reasonable excuse and a meritorious defense.

Defendant asks the Court to exercise its broad equitable powers to relieve it from its obligations, for a rent abatement, postponement of rent or other relief due to Covid-19.

Defendant also claims it has meritorious defenses and relies upon the doctrines of impossibility and frustration of purpose as defenses it should be entitled to raise. It argues that the Court could refuse to enforce the lease as unconscionable under New York Real Property Law § 235-c.

In opposition, plaintiff points out that defendant is a subsidiary of the largest parking garage operator in Manhattan and the parent company has over 200 parking locations in the borough. It also observes that the parent (Icon) is owned by a private equity firm with \$67 billion under its management as of December 2020.

Plaintiff observes that as a landlord it no longer has the option of bringing rent eviction proceedings in Civil Court and is limited to seeking relief in this Court due to various Covid-related executive orders. Plaintiff also points out that defendant has been operating the garage since March 2020 and not paying any rent while keeping all of the revenue generated. It claims that at the beginning of the crisis, plaintiff offered that defendant could pay some percentage of its rent but defendant ignored this request.

In reply, defendant contends that it has a reasonable excuse in that a defendant's time to answer was tolled pursuant to various executive orders signed by the governor. It also insists that its burden to point to meritorious defenses is a lesser standard than one for summary judgment. In addition, defendant argues that plaintiff's request for affirmative relief in its opposition—plaintiff asked for conditions to be imposed on defendant if the Court were to vacate the judgment—is improper as plaintiff did not cross-move for such relief.

Discussion

“An application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of a justifiable excuse and legal merit to the claim or defense asserted” (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9, 739 NYS2d 49 [1st Dept 2002]).

As an initial matter, the Court finds that defendant has stated a reasonable excuse for its default based on the affidavit of Mr. Stiefel (NYSCEF Doc. No. 17), general counsel for defendant’s parent company, who claims that the office where legal papers are received has been closed since the pandemic began and only a limited staff comes into the office as needed. This is a reasonable excuse for not timely answering the complaint.

However, the Court finds that the alleged meritorious defenses cited by defendant are insufficient. Defendant does not dispute the fact that it has not paid rent since March 2020 nor does it claim that it has paid anything to plaintiff (or stashed away funds toward a potential payment) during the pandemic despite continuing to operate the parking garage. The Court recognizes that the pandemic has devastated many businesses, including parking garages that may rely upon commuters or tourists. But that does not mean that defendant can simply walk away from a valid lease.

Both the impossibility and the frustration of purpose doctrines are inapplicable here. “Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract” (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

The doctrine of frustration of purpose requires that “the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense”(*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]). “[T]his doctrine is a narrow one which does not apply unless the frustration is substantial”(*id.*).

Neither doctrine applies because defendant did not face the substantial “frustration” or “impossibility” required to invoke these doctrines. Defendant faced decreased revenue from fewer customers and increased costs from pandemic-related regulations. But a less profitable business is not a basis to find that these equitable doctrines could absolve defendant of its obligation to pay rent (*c.f. PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] [finding that Hurricane Katrina was not a sufficient basis to implicate the frustration of purpose doctrine to excuse payment in New Orleans-based self-storage contract]).

Defendant’s reliance on the governor’s executive orders barring commercial evictions does not compel a different result. Neither the governor nor the state legislature barred landlords from seeking to recover rent owed by tenants. Expressing a hope or desire that a moratorium on commercial evictions will allow a tenant to work something out with the landlord is not a meritorious defense to the nonpayment of rent. And this Court must also recognize that plaintiff, like many landlords, continues to incur expenses such as property taxes and insurance payments in a building where one of its commercial tenants has not paid anything for nearly a year, even though it is continuing to operate.

The Court also rejects defendant’s assertion that a lease for a parking garage is unconscionable under the Real Property Law. That defendant should have to pay rent to a

landlord to operate a parking garage that has continued to operate throughout this pandemic is not unconscionable in any way.

Summary

There is no doubt that there are many commercial tenants like defendant who have faced significant challenges during this pandemic. Defendant's business model relies on visitors and local workers driving to Times Square. Obviously, the number of people driving into Manhattan, and particularly that area of Manhattan, has greatly diminished due to the pandemic. And defendant certainly has greater costs to ensure a safe workplace. But these obstacles cannot support a defense that would absolve them of any responsibility to pay rent. The Court's empathy for defendant's plight is not a basis to find that there is a meritorious defense.

The Court cannot ignore the facts: defendant has not paid since March 2020 and has continued to operate the parking garage. Pointing to equitable doctrines is not sufficient to grant defendant's motion. The Court has to consider the impact of finding that these doctrines constitute a meritorious defense. If a business that was permitted to operate throughout the pandemic (as opposed to others, such as gyms, that were forced to close for months) can assert a frustration of purpose or impossibility defense, then nearly every struggling commercial tenant could seek relief from their leases. Quite simply, here, where there is a downturn in a tenant's business - with or without Covid - it does not invoke the doctrine of impossibility of performance, especially when the business is operating. Nor does it invoke frustration of purpose - defendant's purpose was to operate a garage, and it certainly is doing just that.

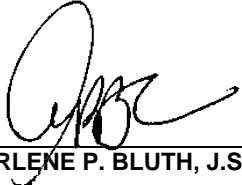
The fact is that nearly every business that relies on in-person customers has suffered greatly during the pandemic and consequently it has also affected nearly every landlord who has

nonpaying tenants. The solution is not for this Court to ignore an otherwise-valid contract to the severe detriment of one party.

Accordingly, it is hereby

ORDERED that the motion to vacate the default judgment and the note of issue for an inquest is denied and all stays are hereby vacated.

The inquest shall take place on March 23, 2021 at 10 a.m.

<u>1/28/2021</u> DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE