

**255 Butler Assoc. LLC v 255 Butler LLC**

2021 NY Slip Op 30337(U)

February 4, 2021

Supreme Court, Kings County

Docket Number: 511560/15

Judge: Leon Ruchelsman

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prior decision granting summary judgement. First, the court ignored other defaults contained in the notice to cure, specifically, the notice to cure contained building code violations and the failure to first submit any plans to the landlord prior to filing them with the City. Second, there are questions whether the Wework lease demonstrated a lack of due diligence required under the lease. Third, the court failed to address how the Wework lease could possibly demonstrate due diligence since such lease was prohibited by the lease. Fourth, there are surely questions of fact whether the plaintiff engaged in due diligence and such issue should be decided by a trier of fact. The plaintiff counters each of these arguments and asserts there are no questions of fact the plaintiff was entitled to summary judgement. Moreover, concerning sanctions the plaintiff argues the court overlooked the discovery violations committed by the defendant and therefore sanctions should be imposed.

#### Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

Concerning the WeWork lease, if the WeWork lease was only a

"draft" as concluded by the pervious court then it had never become effectuated and cannot, on that basis, give rise to an event of default. However, the defendant essentially argues that the prior court failed to consider the far greater consequences of this proposed lease, namely the complete abandonment of the proposed hotel and office building at the site and the tenant's duties and responsibilities bringing that vision to fruition. Thus, even if the lease was not "consummated", an issue in itself, its very existence as an alternative to the proposed plans constitutes a default. That argument is untenable. That argument essentially posits that intending to commit a default under the lease is akin to an actual default, thus, merely contemplating a lease with WeWork amounted to a breach of the lease. Thus, merely negotiating a lease with WeWork whereby WeWork would then be responsible for jobs the lease clearly imposed upon the tenant did not demonstrate an abdication of its requirements under the lease and did not constitute a default.

Further, the court adheres to the prior determination the tenant satisfied its diligence requirements as a matter of law. It is conceded by all parties including the landlord that tenant expended great time and energy and expense to convert the property into a hotel. Its failure to secure financing and other necessary requirements did not mean due diligence was not reached. Indeed, other than embarking on the next stages of the project, which the

plaintiff could not secure financing to accomplish, there was nothing left for the plaintiff to do. Of course, the plaintiff's failure to secure financing led to an impossible situation for the tenant. The tenant could not deliver its core promise, namely the construction of a hotel at the location. Whether there was anything the tenant could do to salvage the situation is the real issue in this lawsuit. However, the tenant surely satisfied its obligation to diligently pursue the plan as outlined in the lease.

Concerning the remaining defaults that were never the subject of any litigation, the prior decision correctly held they could not be the subject of any summary judgement motion. While those defaults were not waived in the specific legal sense, given the facts of this case they were surely abandoned or subsumed within the main default, namely the issue of diligence. All of the other defaults are rooted in the failure to commence construction or technical violations that really have no bearing on the lawsuit. For these reasons they were never pursued and never made the focus of any motion or argument. This court will not disturb the prior determination that such issues could not be raised at this juncture.

Therefore, based on the foregoing, the motion seeking reargument concerning summary judgement is denied.

Turning to the motion seeking to reargue the sanctions determination, the prior decision denied the request holding that

there was no evidence the defendants wilfully destroyed evidence. The court held that since approximately 9,000 emails were not produced pursuant to a 'hit emails' list then clearly those emails were never part of the hit emails at all and thus no sanction was warranted. Upon reargument the plaintiff asserts that the failure to produce was not because the emails did not match the hit list but rather those emails did match the hit list but were not produced anyway, clear evidence of a failure to disclose warranting a sanction.

The plaintiff does not make any argument other than the fact the court exercised "leniency" toward the defendant. However, that is not a basis upon which to grant reargument. Thus, the court rejected the plaintiff's core contention that since missing emails were not produced there must be a wilful failure to comply with discovery. The reargument motion merely asserts again that the failure to produce the emails was wilful. However, the court carefully and thoroughly reviewed the arguments and concluded no such sanction is warranted. Other than asking to court to examine the evidence yet again with an eye toward wilfulness there are no real arguments presented that have not already been considered. Thus, the court adheres to the previous determination and concludes again that no sanction is warranted.

Moreover, the court has reviewed the 'hot' emails in camera and concludes that the emails are in fact privileged.


Lastly, any motion seeking fees is denied.

Therefore, based on the foregoing the motion seeking to reargue the sanctions determination is denied. Thus, all motions seeking reargument are denied.

So ordered.

ENTER:

DATED: February 4, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC