

111 Fulton St. Invs., LLC v Fulton Quality Foods LLC
2021 NY Slip Op 30348(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 653579/2020
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

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

Justice

-----X

111 FULTON STREET INVESTORS, LLC,

Plaintiff,

- v -

FULTON QUALITY FOODS LLC, GEORGIOS NIKAS

Defendant.

-----X

INDEX NO. 653579/2020

MOTION DATE 02/04/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The motion by plaintiff for summary judgment against defendant Fulton Quality Foods LLC (“Fulton Quality”) and dismissing this defendant’s counterclaims is granted.

Background

Plaintiff is the landlord for a commercial space located on the ground floor in a building in Manhattan. Fulton Quality entered into a lease for the premises in 2011 for a twelve-year term. Fulton Quality runs a restaurant at the site. Plaintiff insists that Fulton Quality is in default of the lease and points to an October 30, 2019 letter allegedly sent to Fulton Quality that sets forth the basis of the default. Fulton Quality later cured its defaults but stopped making payments in March 2020. Another default letter was sent in June 2020. Plaintiff moves for summary judgment seeking the amount it claims is due.

In opposition, Fulton Quality raises numerous reasons why the motion should be denied. Fulton Quality argues that plaintiff failed to attach the pleadings to the motion, that there is no

affidavit of merit and that plaintiff did not send bills and notices to both the tenant and its attorney in accordance with the lease.

Fulton Quality also claims that it has meritorious defenses that should compel the Court to deny the instant motion. It claims that the ongoing pandemic forced it to shut down its restaurant and, therefore, the purpose of the lease was frustrated. Fulton Quality also points to a “casualty clause” and the “eminent domain clause” of the lease as reasons to deny the instant motion.

In reply, plaintiff claims that the frustration of purpose defense fails as a matter of law, that Covid-19 was not a “casualty” and it was not a “taking” under the eminent domain provision of the lease.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Procedural Issues

As an initial matter, the Court finds that plaintiff has met its prima facie burden. The fact that plaintiff did not attach a copy of the pleadings to the motion is of no moment because this an e-filed case and the docket is readily accessible. The Court also finds that the “certification” of Mr. Rosenberg, officer for plaintiff, satisfies the requirement that plaintiff file an affidavit of merit in support of its motion. Moreover, plaintiff established that it sent the proper notices concerning a default pursuant to the lease and that it has standing to bring this case.

Frustration of Purpose

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.*).

The Court finds that this doctrine is inapplicable. The record on this motion shows that Fulton Quality only made a partial payment of rent on March 1, 2020. Restaurants were not shuttered for indoor dining until March 20, 2020. Even if the Court were to entertain the notion that frustration of purpose could help a tenant avoid paying any rent while still operating a

takeout business, it appears that Fulton Quality had financial issues before the pandemic devastated the restaurant industry. On March 1, 2020, the pandemic did not prevent Fulton Quality from paying its rent and it only paid \$10,000 of the \$34,097.23 due. While the pandemic certainly reduced Fulton Quality's ability to improve its business, it was not the cause of the initial failure to pay the full amount due. Therefore, this common law defense does not raise an issue of fact.

Casualty and Eminent Domain Clauses of the Lease

Fulton Quality insists that Section 10.1 of the lease (the casualty clause) renders its performance under the lease as impossible. The Court disagrees. That provision references damage to the building (such as a fire) that renders the commercial space unusable. A deadly infectious disease is not a "casualty." Throughout 2020, Fulton Quality was able to operate by doing takeout and delivery, outdoor dining if it acquired the proper permits and limited indoor dining during certain months. The physical space (and kitchen) was available to this defendant. That customers decided not to place as many orders does not lead to a conclusion that the pandemic qualifies as a casualty under the terms of the lease.

The Court also declines to find that pandemic-related restrictions qualifies as a taking sufficient to invoke Section 11.1 of the lease concerning Eminent Domain. No physical portion of the restaurant was taken for public or quasi-public use. Rather, governmental restrictions designed to save lives limited the operations of Fulton Quality. Under Fulton Quality's view, any regulation that limits the operation of a business would constitute a taking. The Court declines to endorse such a broad and expansive view of the definition of a taking.

Because Fulton Quality does not dispute the amount sought by plaintiff, the Court awards plaintiff the amount sought in its motion. The Court also dismisses the case against defendant

Nikas as this Court has already found that plaintiff failed to properly serve this defendant (NYSCEF Doc. No. 26).

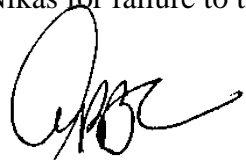
Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment, to strike the answer and counterclaims of defendant Fulton Quality Foods LLC is granted and the Clerk is directed to enter judgment in favor of plaintiff against this defendant in the amount of \$410,864.71 plus interest from June 26, 2020 along with costs and disbursement upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and a hearing will be held by the court to determine the amount due to be scheduled by the clerk of this part; and it is further

ORDERED that the case is dismissed as against defendant Nikas for failure to timely serve this defendant.

2/5/2021
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE