

<b>Quaestor Global Sec. LLC v 34th St. LLC</b>
2021 NY Slip Op 30805(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 653413/2020
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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INDEX NO. 653413/2020

QUAESTOR GLOBAL SECURITIES LLC,

MOTION DATE 03/08/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

34TH STREET LLC, JAY SUITES II LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied. The cross-motion by defendants to dismiss and for summary judgment on its counterclaim for costs is granted.

Background

Plaintiff brings this case about a license agreement between the parties. It claims that it entered into a license agreement with defendant 34th Street LLC ("34th") on July 8, 2019. 34th granted a license to plaintiff to use a conference room, receive mail and other services at an office building located at 31 West 34th Street. Basically, the license agreement was similar to a commercial lease except that the agreement specifically stated it did not create a leasehold interest in the office space.

Plaintiff claims that the governor's executive order dated March 7, 2020 rendered the premises as a "non-essential business." It asserts that in compliance with this order, it removed all personal property and surrendered the premises to 34th and requested return of the remaining eight days of its pre-paid March payment and its security deposit. Plaintiff claims that 34th has

refused to return the money. It also brings a cause of action for negligent misrepresentation against defendants on the ground that they offered misleading statements about services they could offer in contravention of the governor's pandemic relating restrictions. Plaintiff asserts a cause of action based on the implied duty of good faith and fair dealing. It seeks damages of \$5,354 (refund of the pre-paid March amount plus the security deposit) as well as punitive and treble damages.

Plaintiff now moves for summary judgment and points to an executive order issued by the governor that reduced the in-person workforce at non-essential businesses by 100% as of March 22, 2020. It claims that defendants continued to represent that their business remained open to the public and they had the right to license it for use by plaintiff. (Apparently, the license was to use office space but the agreement specifically stated it did not create a leasehold interest in the space). It argues that because the agreement analogized plaintiff's use of the space to a hotel, defendants should be compelled to return the security deposit within 4 weeks because the "hotel" was closed. Plaintiff also seeks dismissal of the defendants' affirmative defenses and counterclaims for costs.

Defendants cross-move to dismiss the complaint and for summary judgment on its counterclaim for costs. They claim that the executive orders banning in-person workers did not terminate the agreement. Defendants emphasize that the various executive orders did not ban principals from reporting to the building or using the premises for mail or maintaining files. They argue that plaintiff, a broker-dealer registered with the SEC, is "arguably" an essential business.

In reply and in opposition to the cross-motion, plaintiff suggests that both defendants are liable despite the fact that the contract was with 34th because the defendants comingled the

funds. Plaintiff demands that the corporate veil be pierced. With respect to the cross-motion, it questions how defendants could be entitled to \$100,000 in legal fees even if defendants were successful.

### 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]).

The Court denies plaintiff’s motion and grants the cross-motion. As an initial matter, plaintiff did not meet its prima facie burden to show that there was a breach of contract. The

agreement it attached to the complaint (the only agreement on the docket) states that the contract ended on January 31, 2020 (NYSCEF Doc. No. 2). Although the agreement contains a provision regarding automatic extension of the agreement's term (paragraph 3), plaintiff did not allege or explain why the lease was in effect at the time of the executive order in question (March 22, 2020). In any event, since both parties seem to agree there was an agreement in effect at the time of the executive order, the Court will consider the parties' arguments regarding plaintiff's purported termination.

The "cancellation" letter from plaintiff to defendant dated March 23, 2020 states that the governor's executive order terminated the license agreement (NYSCEF Doc. No. 4). But there is no support, either in the governor's executive order or in binding case law, that compels the conclusion that the pandemic-related regulations terminated an agreement between two private entities. The letter does not cite to any provision of the license agreement regarding termination of that contract; it merely states plaintiff's view that the governor's order ended the contract and plaintiff intended to clear out its stuff.

If the Court assumes that the agreement was extended, then the agreement provides that either party can terminate the contract by giving notice at least sixty days prior to the end of the term (NYSCEF Doc. No. 2, ¶ 3). There is no allegation presented by plaintiff that it properly terminated the contract in accordance with the applicable terms. Instead, the letter from plaintiff seems to say the contract is over immediately. This Court is unable to find that the executive order absolved plaintiff of its obligation to abide by the provisions of the license agreement and state, without any basis, that the contract was over.

Although plaintiff explains in great detail why this agreement was not a lease (although the agreement seems to resemble a lease in many respects), that does not change the Court's

conclusion. It was not, as plaintiff argues, a hotel that was no longer receiving guests. Rather, it was office space that was licensed instead of leased that plaintiff says it was unable to access. That does not compel the Court to ignore the contract. Accordingly, the Court finds that defendants did not have to repay the days from March 22, 2020 through the end of the month nor was it required to return the security deposit because plaintiff did not comply with the terms and conditions of the agreement. There is no basis to find a cognizable breach of contract claim (plaintiff's first cause of action).

The Court also dismisses the negligent misrepresentation claim because plaintiff did not adequately allege the misrepresentation that it relied upon. Although plaintiff asserts that defendants lied about the building being open, plaintiff's letter stating it was leaving the premises is dated March 23, 2020—the day after the governor's order restricting in-person workers. How could plaintiff have relied upon any alleged misrepresentation when it made clear its intention to immediately surrender the premises and its view that the executive order terminated the license agreement?

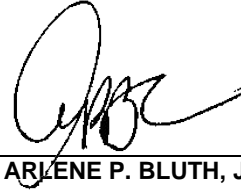
Also dismissed is the claim for breach of the implied covenant of good faith and fair dealing. Having found that there was no breach of contract, this does not state a cognizable claim. Moreover, there is no basis to find that the relationship between the parties was anything other than a typical business transaction rather than a special relationship that might implicate this doctrine.

The Court grants the cross-motion for costs, including reasonable legal fees for defendants and directs defendants to file a note of issue for a trial on damages.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied; and it is further

ORDERED that the cross-motion by defendants to dismiss the complaint and for summary judgment on its counterclaim for costs is granted and defendants are directed to file a note of issue on or before March 25, 2021.



3/9/2021  
DATE

ARLENE P. BLUTH, J.S.C.

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