SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART 33EFM**

Justice

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ADAM SANDERS and RANDI SANDERS,

Plaintiffs,

- v -

EDISON BALLROOM LLC,

Defendant.

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INDEX NO. 654992/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers 8, 9, 10, 11, 12, 13, 14. 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion for SUMMARY JUDGMENT.

In this action to recover moneys deposited for an event at defendant Edison Ballroom, LLC's facility, which did not occur due to the COVID-19 pandemic, plaintiffs move for an order (i) granting them summary judgment on their breach of contract claim in the amount of $10,048.73, plus attorney fees, costs, expenses, and interest, and (ii) dismissing defendant's counterclaim. Defendant opposes the motion, and cross moves for an order granting summary judgment on its counterclaim and dismissing the complaint.

Background

Unless otherwise noted, the following facts are undisputed or based on the documentary evidence before the court. The parties entered into an agreement dated May 25, 2018 (the "Agreement") (NYSCEF # 13) for plaintiffs' use of the Edison Ballroom (the "Venue"), which is owned and operated by defendant, to host their daughter's bat mitzvah (the "Event"). The Event was to take place on April 25, 2020, to coincide with plaintiff's daughter's 13th birthday (*id.,* 9).

The Agreement stipulated as consideration for the Venue and services for the Event, the payment of $50,243.63, and required Plaintiffs to make the following payments: (i) $10,048.73 on May 30, 2018, (ii) $15,073.09 on January 20, 2020, (iii) $10,048.73 on February 17, 2020, (iv) $10,048.73 on March 17, 2020, and (v) $5.024.23 on April 23, 2020 (NYSCEF # 9) (*id.*). Plaintiffs paid $45,219.28 in accordance with the Agreement (NYSCEF # 14).

Of relevance here, the Agreement contains a clause entitled "Acts of God, Force Majeure," which provides that:

> Neither party shall be responsible for failure to perform [the Agreement] if circumstances beyond its reasonable control, including, but not limited to, acts of God, … [or] governmental authority … make it illegal or impossible for the affected party to hold [the Event]. For the Avoidance of Doubt, in the event of any such acts of God, Edison Ballroom shall refund all payments made by [Plaintiffs] to [Defendant] and [Plaintiffs] shall have no further obligation to [Defendant].

(*id.*,14) (hereinafter "Force Majeure clause").

On March 7, 2020, before the final deposit of $5,024.23 was due, the Governor of the State of New York issued Executive Orders limiting the number of individuals allowed to lawfully gather and the maximum occupancy of facilities like the Venue (the "Executive Orders"). On March 16, 2020, the parties entered into an agreement to postpone the Event to October 2, 2020 (NYSCEF # 15).[1] As of October 2, 2020, the Governor's Executive Order limiting capacity was still in effect.

Plaintiffs subsequently demanded a refund of their deposit payments. When defendants failed to return the money, plaintiffs commenced this action for breach of contract seeking the return of their deposit of $45,219.28, together with attorneys' fees and interest (NYSCEF # 10). Defendant answered the complaint and asserted a counterclaim for a declaration that the parties' rights and obligations under the Agreement are not cancelled but suspended until the passing of the COVID-19 emergency (NYSCEF # 11, ¶¶ 15-21).

In the meantime, on January 4, 2021, plaintiffs' credit card company refunded to plaintiffs the payments they made on January 20, 2020 ($15, 073.09), February 17, 2020 ($10,048.73), and March 17, 2020 ($10,048.73) (NYSCEF # 9, ¶ 13). Accordingly, there remains $10,048.73 at issue in this action.

Plaintiffs move for summary judgment on their single cause of action for breach of contract, arguing that under the Force Majeure clause they are entitled to the remaining deposit, together with attorney's fees, expenses and interest.

Defendant opposes the motion and seeks summary judgment on its counterclaim seeking the suspension of the Agreement until it can be performed, arguing that the court should use its equitable powers to fashion this or another

[1] The postponement agreement submitted by the parties is unsigned; however, the parties do not dispute that the agreement was made.

remedy since the COVID-19 emergency was not within the contemplation of the parties at the time they entered the Agreement. Defendants also argue that plaintiffs are not entitled to recover the payment of attorneys' fees, as the indemnity clause in the Agreement permits the recovery of such fees arising from defendants' negligence or that of their agents.[2]

In opposition to the cross motion and in support of their motion, plaintiffs argue that as the Agreement is unambiguous, it should be enforced in accordance with its terms, which do not require the Event to be rescheduled or allow defendants to retain their money until governmental restrictions are lifted. Plaintiffs also assert that the Event's objective was to celebrate plaintiffs' daughter 13th birthday in April 2020, rendering performance of the Agreement impracticable.

In reply, Defendant argues that the court has the authority to invoke equitable remedies where, as in this case, a legal remedy is inadequate.

Discussion

The moving party on a motion for summary judgment 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 issue of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party makes this showing, the burden shifts to the opposing party to submit evidentiary proof sufficient to raise triable issues of fact (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

A party asserting a claim for breach of contract must establish (1) the existence of a contract; (2) the party's own performance under the contract; (3) the other party's breach of the contract; and (4) resulting damages. (*US Bank Natl.*

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[2] The pertinent part of the Agreement's indemnity clause reads as follows:

> [The Defendant] agrees to indemnify and hold harmless the [Plaintiff] against all losses, claims, lawsuits, injuries, damages, expenses and other costs or obligations (including reasonable attorneys' fees), judgments and disbursements against or incurred by the [Plaintiff] arising out of the Function or this Agreement, to the extent caused by the negligent acts or omissions of [the Defendant] or its employees, contractors, or agents.

(NYSCEF # 13, 14)

Assn. v Lieberman, 98 AD3d 422, 423 [1st Dept 2012]). Courts have interpreted force majeure clauses according to their function of relieving a party from its obligations when "expectations are frustrated due to an event that is an extreme or unforeseeable occurrence" and "beyond [the parties'] control and without its fault or negligence" (*Team Mktg. USA Corp. v Power Pact, LLC*, 41 AD3d 939, 942–43 [3d Dept 2007] [internal citation and quotation omitted]; *see Goldstein v Orensanz Events LLC*, 146 AD3d 492, 493 [1st Dept 2017][force majeure clause must be interpreted as to purpose which is "to limit damages …where the reasonable expectations of the parties and the performance of the contract have been frustrated by purposes beyond the control of the parties"][internal citations and quotations omitted]).

It is well established that when there is an unambiguous written agreement, courts must enforce the plain meaning of the agreement by its terms without creating ambiguities not present in the document itself (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]; *see Slamow v Del Col*, 79 NY2d 1016, 1018 [1992] ["the best evidence of what parties to a written agreement intend is what they say in their writing"]).

Under these principles, plaintiffs have met their burden on summary judgment. First, there is no dispute as to the existence of the Agreement or as to plaintiffs' performance, including the timely making of the required payments. Next, plaintiffs have shown that defendant breached the Agreement by refusing to refund plaintiffs under the Force Majeure clause, which provides for such a refund in the event performance of the Agreement becomes "illegal or impossible" because of "acts of a governmental authority." Here, it is undisputed that the Agreement's performance, including after the agreement to postpone Event was made, was illegal or impossible as a result of "acts of a governmental authority," such as the Governor's Executive Orders.

Accordingly, the burden shifts to defendants to raise a triable issue of fact. In opposition, defendants assert that the parties did not envision a government shutdown at the time they entered into the Agreement, and therefore the court should invoke its equitable powers to suspend performance of the Agreement until performance is possible. This argument is without merit. When, as here, "the agreement on its face is reasonably susceptible to one meaning, the court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569–70 [2002]). Thus, notwithstanding the deleterious economic impact of the COVID-19 emergency on defendant's business, in light of the unambiguous agreement, the court does not have authority to exercise its equitable powers to rewrite the Agreement to temporarily suspend performance until the Event is permitted to occur.

Regarding plaintiffs' claim for attorney fees and expenses, it is well established that "attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the losing party unless an award is authorized by agreement between the parties or by statute or court rule" (*A.G. Ship Maint. Corp. v Lezak*, 69 NY2d 1, 5, [1986]). Here, there is no basis for awarding plaintiffs attorneys' fees, and the Agreement's indemnity provision, which requires defendant to pay plaintiffs' attorney fees in the event of the negligence of defendant or its agents, is inapplicable here.

Accordingly, plaintiffs are entitled to summary judgment on their breach of contract claim to the extent of the $10,048.73, paid, and not refunded, and the counterclaim must be dismissed.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion for summary judgment is granted, and plaintiffs are awarded judgment on their breach of contract claim except with respect to their request for attorneys' fees and expenses, and defendants' counterclaim is dismissed; it is further

ORDERED that defendant's cross motion is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment (i) in favor of plaintiffs Adam Sanders and Randi Sanders, and against Defendant Edison Ballroom LLC, in the sum of $10,048.73, plus interest at the statutory rate from November 1, 2020, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and (ii) dismissing defendant's counterclaim.

3/22/21
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[x]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[x]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		