

Tabor v 148 Duane LLC
2021 NY Slip Op 30966(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 156655/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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TIMOTHY TABOR and AKIKO TABOR,

Plaintiffs,

- v -

148 DUANE LLC,

Defendant.

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INDEX NO. 156655/2018

MOTION DATE _____

MOTION SEQ. NO. 004

**SUPPLEMENTAL DECISION +
ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 158-191, 193 were read on this motion to _____ extend time _____.

Pursuant to the decision and order dated November 10, 2020, on March 26, 2021, a hearing was held on defendant's motion for an order staying, tolling or extending, without penalty, its agreement to complete certain repairs and renovations to the building and apartment in which plaintiffs reside. (NYSCEF 193).

I. BACKGROUND

In the agreement, entered into on the record on August 1, 2019, plaintiffs agreed to relocate from their apartment for 12 months, and defendant agreed, *inter alia*, that "[i]n the event that the relocation needs to be extended beyond the twelve-month period because the [defendant] failed to complete the construction within that time period there will be a per-diem penalty of \$500 per day without prejudice to the [plaintiffs] seeking additional remedies before this Court." (NYSCEF 161).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the hearing, it was established through the testimony of the sole testifying witnesses,

Joe Carraciolo and Kent Swig, called by defendant, that work had ceased at the premises in March 2020 due to government restrictions arising from the COVID-19 pandemic, and that in late April 2020, some limited work had resumed. According to Carraciolo, the building's property manager and a co-owner of defendant and the general contractor, five months more of work is required to complete the project.

Swig, the other co-owner of defendant and the general contractor, acknowledged that in July 2020, he had forestalled a default on the loan that financed the project by paying the bank \$2 million. Since that time, however, no work was performed at the premises other than emergency repairs due to a disagreement between defendant and its main contractor concerning money owed the contractor for the project. The contractor filed a mechanic's lien against the building and defendant terminated it.

Swig also acknowledged that in November 2020, the loan that financed the project had matured and that the bank would not extend it. He also maintained that the halt in construction occasioned by the pandemic caused work to back up and deliveries to be delayed or not made, all adversely impacting the financial health of the contractor and subcontractors. He represented that he expects the bank to extend the loan in a matter of a few weeks.

Where a failure to perform a contract is preceded by "an unanticipated event that could not have been foreseen or guarded against," the event excuses performance if it was "objectively impossible." (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]). However, "[w]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." (*407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]). "[T]he defendant in a contract dispute has the burden to prove that non-performance is excused

by impossibility.” (*Clarex Ltd. v Natixis Sec. Americas LLC*, 988 F Supp 2d 381, 393 [SD NY 2013], citing *Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290, 290 [1st Dept 1991]).

Based on the credible portions of the testimony, I find that defendant’s inability to complete construction within a year from August 2019 was due to defendant’s financial difficulties. While the COVID-19 pandemic had an undoubted impact on the construction, defendant offered no evidence that it prevented the resumption of work beyond emergency repairs in late April 2020. That it rendered the work more costly and difficult is immaterial, as is the financial dispute with the contractor that arose in July 2020, as neither circumstance rendered defendant’s performance objectively impossible. Moreover, Swig conceded that defendant has not sought to hire another contractor, and defendant offered no evidence connecting the greater costs and difficulty brought by the pandemic to the work stoppage that continues to today.

Even if defendant’s financial difficulties had their origins in the pandemic, they do not excuse its obligation to complete construction absent any indication that it was physically impossible for the work to continue once permitted. (*See Gap Inc. v Ponte Gadea New York LLC*, 2021 WL 861121, *10 [SD NY 2021] [contractual obligation to pay rent not excused for impossibility, as commercial tenant could still sell products]; *35 East 75th Street Corp. v Christian Louboutin LLC*, No. 154883/2020, 2020 WL 7315470, *3 [Sup Ct, NY County 2020] [commercial tenant stopped paying rent due to COVID-19; as store intact and defendant permitted to sell products, impossibility defense not applicable]). Consequently, even if the *force majeure* clause of the parties’ lease could be incorporated into the agreement, defendant’s reliance on it is misplaced. In any event, there is no indication in the agreement that it constituted an amendment to the lease. (*See Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 396 [1st Dept 1996], quoting *Ripley v Int’l Rys. of Cent. Am.*, 8 NY2d 430, 438

[1960], and *Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972] [contracts considered separate and independent, unless “history and subject matter shows them to be unified,” and in making determination, primary standard is intent manifested, viewed in surrounding circumstances]).

III. CONCLUSION

For all of these reasons, defendant does not sustain its burden of proving that the COVID-19 pandemic rendered its performance objectively impossible once the government restrictions were lifted at the end of April 2020.

Accordingly, it is hereby

ORDERED, that defendant’s motion to stay, toll, or extend the temporary relocation agreement is denied.

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3/29/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE