

352 Acquisition Co., LLC v Martinez

2021 NY Slip Op 31273(U)

April 14, 2021

Supreme Court, New York County

Docket Number: 159467/2020

Judge: Arlene P. Bluth

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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

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352 ACQUISITION CO., LLC

Plaintiff,

- v -

DAVID PEREZ MARTINEZ, M.D.

Defendant.

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INDEX NO. 159467/2020

MOTION DATE 04/13/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

The motion by plaintiff for summary judgment is granted.

Background

Plaintiff contends that it leased office space to defendant and that he stopped paying the rent and owes over \$30,000 through February 2021. It also seeks dismissal of defendant’s affirmative defenses.

Defendant explains that he had a personal relationship with one of the members of plaintiff. He observed that he was hesitant to sign an extension of the lease as he contemplated retirement, but ultimately agreed to a five-year renewal in 2019 (NYSCEF Doc. No. 22, ¶ 9). Defendant observes that because of the ongoing pandemic, he was unable to see patients in person starting in March 2020 and eventually concluded that it was time to retire. He claims he reached out to plaintiff to get out of the lease. But defendant did not attach a surrender agreement limiting his liability.

Defendant insists that there are issues of fact with respect to whether the plaintiff modified the lease and accepted defendant's surrender, whether plaintiff complied with its promise to mitigate damages and whether the pandemic rendered the premises unusable.

In reply, plaintiff emphasizes that defendant admitted that he signed the lease extension, did not pay the rent, and did not attach a surrender or termination agreement.

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 grants the motion. The fact is that defendant admits that he signed a lease extension and stopped paying the rent. Moreover, defendant failed to attach a formal agreement concerning the surrender of the premises. All that is attached is an email thread from plaintiff in which Paul (defendant's friend who was a partial owner of the building) expresses that he hopes to find a new tenant in order to mitigate plaintiff's damages (NYSCEF Doc. No. 23). He also observed that while finding a new tenant might preclude the need for litigation, finding another tenant for the space did "not conclude our business relationship" (*id.*).

Nothing in this email thread creates an issue of fact that could compel the Court to deny the motions. Instead, it evidences a landlord attempting to work something out with a valued tenant who stopped paying rent. But those efforts do not show that plaintiff let defendant walk away from the lease. The Court recognizes that defendant may have wanted plaintiff to let him surrender the premises but that hope is not a basis to void the lease.

To the extent that defendant claims that the pandemic should somehow absolve him of his obligations under the lease, that claim is rejected. Neither the frustration of purpose doctrine nor the impossibility doctrine apply here. The provisions of the lease defendant relies on deal with a severe storm (Article 11.02) and a fire or other casualty (Article 11.03). Here, defendant admits in his affidavit that because of the pandemic he decided to retire and close his practice. There is no basis to find that either of these doctrines would preclude plaintiff's recovery where defendant freely admits he stopped trying to run his practice. Even if these doctrines could prevent a landlord from recovering unpaid rent due to the pandemic (and the Court questions whether they could apply to a psychiatry practice), it certainly has no application where defendant shut down his practice years before the end of the lease.

The Court also points out that defendant did not sufficiently dispute the amount claimed so the Court awards the \$34,360.57 sought by plaintiff.

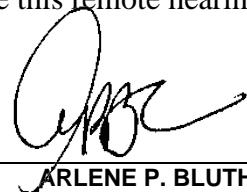
Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted, the affirmative defenses asserted by defendant are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$34,360.57 plus interest from February 1, 2021 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable attorney's fees for plaintiff is severed and shall be determined at a hearing (the Clerk of this part shall schedule this remote hearing).

4/14/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE