150 Amsterdam Ave. Holdings LLC v TMO Parent LLC
2021 NY Slip Op 31395(U)
April 21, 2021
Supreme Court, New York County
Docket Number: 653174/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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150 AMSTERDAM AVENUE HOLDINGS LLC,

Plaintiff,

- v -

TMO PARENT LLC,KING 67 LLC A/K/A KING 67TH LLC,

Defendant.

---X

INDEX NO. 653174/2020

MOTION DATE 04/20/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

The motion for summary judgment by plaintiff is granted as to liability only.

Background

In this commercial landlord tenant case, plaintiff claims that defendant King 67 LLC aka King 67th LLC (‘Tenant”) runs a parking garage at a building owned by plaintiff pursuant to a lease entered into in 2010. Defendant TMO Parent LLC (“Guarantor”) is the guarantor of the lease.

Plaintiff claims that the Tenant failed to pay rent in April, May and June of 2020 and it sent a notice dated June 8, 2020 demanding immediate payment of all rent due. After it received no response or payments, plaintiff sent another notice and eventually started this case.

Plaintiff now moves for summary judgment and to dismiss defendants’ ten affirmative defenses. It insists that there is no dispute that the Tenant defaulted.

In opposition, defendants contend that there must be discovery before plaintiff’s motion can be considered. Defendants point out that the parking garage they operate is located near

Lincoln Center and the ongoing pandemic has decimated their revenue. They admit that the Tenant was not required to shut down operations but it still felt the harmful effects of the pandemic. In fact, they acknowledge that the Tenant is unable to afford the rent.

Defendants also argue that there are issues of fact with respect to liability under the Guaranty, legal fees, and foreseeability of the pandemic. They point out that the guaranty is limited to $350,000; defendants also maintain that the lease and the guaranty require a ten-day and five-day demand as a condition precedent to legal fees.

Defendants also argue that the doctrine of frustration of purpose should compel denial of the instant motion. They insist that the pandemic was not foreseeable and, therefore, they should not have to pay any rent. In the alternative, defendants maintain that an inquest is required if the Court grants the motion and they insist plaintiffs' damages calculations are faulty.

In reply, plaintiff argues that defendants did not address the Guarantor's absolute waiver of any rights with respect to the guaranty. Plaintiff contends that the frustration of purpose doctrine is irrelevant and cites to various opinions issued by this Court. With respect to the guaranty, plaintiff concludes that it is not limited to $350,000 because that limitation relates only to the Tenant's obligations after the Tenant surrenders the premises. Plaintiff argues that the guaranty does not have any limit regarding liability for damages incurred prior to the Tenant's vacatur of the leased space.

Plaintiff argues that the Guarantor got sufficient notice of the demand for legal fees and observes that the guaranty did not contain a method of service for this notice. It contends that the service of the summons and complaint is sufficient.

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. As an initial matter, the Court observes that defendants admit that the Tenant has not paid rent while continuing to run the parking garage. Therefore, the only question is whether there is an issue of fact raised by defendants that could justify their failure to pay rent. Defendants point to the doctrine of frustration of purpose. That doctrine 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 concludes that this doctrine has no applicability here. Defendants ran a parking garage that remained open throughout the pandemic; they rented space for a parking garage and have continued to operate the parking garage. Although the Court has no doubt that defendants' revenue plummeted due the ongoing pandemic, that does not justify the invocation of a doctrine that would invalidate the entire contract. Losing revenue is not a basis to find that the purpose of the contract was completely frustrated. As stated above, the frustration must be so substantial that it would make no sense to enter into the contract.

Under defendants' theory, a tenant could walk away from a contract and be absolved of any obligations simply because outside factors hurt their bottom line. The Court is unable to embrace that view of the frustration of purpose doctrine. A party's subsequent unhappiness with the terms of the agreement does not mean that party can get out of the contract. Consider how a landlord might utilize this view; imagine a landlord who enters into a long-term lease, such as the one here, and then realizes a few years into the lease that the market rate for the leased premises far exceeds what the tenant is paying. Would that landlord be permitted to invoke the frustration of purpose doctrine? Of course not. Understandably, the landlord might say that it would not have entered into the contract had it known the market would drastically improve. But that is not the type of situation the frustration of purpose doctrine is meant to address.

The Court also finds that plaintiff is entitled to recover reasonable legal fees. As plaintiff points out, the guaranty only provides that plaintiff must give the Guarantor five days to pay legal fees (NYSCEF Doc. No. 55, ¶ 2). This provision does not say whether the demand must occur prior to a lawsuit or how this demand must be delivered. Therefore, the Court finds that

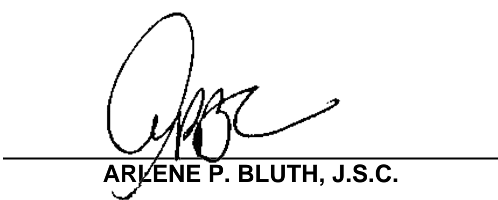
making the demand in connection with the instant lawsuit was appropriate for plaintiff to recover legal fees against both defendants.

The Court also finds that the Guarantor's liability is not limited to $350,000. That limitation only applies to damages incurred after the expiration of the lease (*id.* ¶ 1[b][1]). There is no dispute that the Tenant remains in the property; therefore, the Guarantor is liable for all damages.

However, the Court finds that an inquest is necessary to determine the amount due to plaintiff. The notice of motion and memorandum of law do not seek a specific judgment amount. Instead, plaintiff attaches an affidavit from plaintiff's principal (NYSCEF Doc. No. 51) who refers the Court to a tenant ledger (although this affidavit also does not demand a specific amount). The ledger referred to appears to include legal fees (*id.*) and this Court can only award reasonable legal fees, not every dollar billed by plaintiff. Moreover, in reply, plaintiff attached a ledger that has different totals for the amount due through February 2021 (*see* NYSCEF Doc. No. 86). Based on these submissions, the Court concludes that there must be an inquest.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted as to liability only and the affirmative defenses asserted by defendants are severed and dismissed, and plaintiff is directed to file a note of issue for an inquest on or before May 7, 2021. The Clerk of the Part will schedule an inquest after the note of issue is filed.



4/21/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE