Bay Plaza Community Ctr., LLC v Bronx Vistasite Eyecare, Inc.
2021 NY Slip Op 31568(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 656407/2020
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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BAY PLAZA COMMUNITY CENTER, LLC

Plaintiff,

- v -

BRONX VISTASITE EYECARE, INC. D/B/A VISTASITE EYE CARE,

Defendant.

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INDEX NO. 656407/2020

MOTION DATE 05/03/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

The motion by plaintiff for summary judgment is granted.

Background

This commercial landlord tenant case arises out of a property owned by plaintiff and leased by defendant. Plaintiff claims that defendant failed to pay the rent from April 1, 2020 through the present.

In opposition, defendant claims that there are numerous issues of fact that should compel the Court to deny plaintiff's motion. It argues that various governmental orders relating to the pandemic devastated its business as an optometrist and eyewear retailer. Defendant contends that the temporary closure of its business due to these outside factors constitutes a "taking" under the terms of the lease. It also points to the doctrines of impossibility and frustration of purpose to excuse its failure to pay rent.

Defendant observes that it was completely shut down from March 20, 2020 through June 20, 2020 and then operated in a limited capacity to late August 2020. It maintains that it has only been able to operate at 80% of its pre-pandemic capacity.

In reply, plaintiff contends that defendant failed to raise an issue of fact. It disputes the applicability of the frustration of purpose and impossibility doctrines.

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 finds that the various executive orders do not constitute a taking. "A taking occurs when there has been an intrusion onto the property and interference with the owner's property rights to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from the owner" (*Ren's Realty, Inc. v Town of Vienna*, 295 AD2d 975, 975, 743 NYS2d 644 [4th Dept 2002] [internal quotations and citations omitted]). There is nothing submitted on this motion that suggests that the executive orders issued during the pandemic comes close to a taking. This is not a case where the government condemned the building or invoked the doctrine of eminent domain. Rather, there were temporary orders limiting capacity that have long since passed. And the fact is that defendant has not paid any rent since last April despite the fact that, according to defendant, it has operated its business since June 2020.

The Court also finds that the doctrines of frustration of purpose and impossibility have no place in this case. The doctrine of frustration of purpose 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*.).

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have

been foreseen or guarded against in the contract" (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902, 524 NYS2d 384 [1987]).

Unfortunately for defendant, the fact that its business has suffered due the pandemic is not a basis to invoke either doctrine. The inability to turn a profit has never been recognized as a valid justification to excuse a tenant's failure to pay rent. The doctrines cited above refer to a broader inability to perform under the contract such as leasing a building that burns down before the lease begins. A temporary hardship, like the one described by defendant, would vastly expand the reach of these doctrines if it could excuse a tenant's obligation to pay the rent.

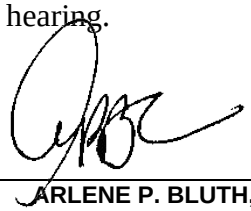
The Court also finds that there was valid consideration-- defendant retains use of the premises-- and rejects defendant's remaining arguments. The Court is well aware of the difficulties that businesses across New York City have faced because of the ongoing pandemic. But that does not mean that a tenant can walk away from a valid lease because its business has suddenly become unprofitable, even if the tenant's struggles are due to forces outside of its control.

The Court observes that in support of its motion, plaintiff included a table detailing how much is due (NYSCEF Doc. No. 8). Defendant did not sufficiently object to the amount sought by plaintiff; instead defendant offered a conclusory assertion that there is an issue of fact with respect to how much plaintiff is owed. Therefore, the Court grants plaintiff the amount it seeks.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $444,084.90 plus interest from March 31, 2021 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees shall be determined at a remote hearing before this Court, and the Clerk of this part shall schedule such hearing.



5/5/2021
DATE

ARLENE P. BLUTH, J.S.C.

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