

Mall 1-Bay Plaza, LLC v Bronx Vistasite Eyecare, Inc.
2021 NY Slip Op 31569(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 656408/2020
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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MALL 1-BAY PLAZA, LLC

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 656408/2020

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) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

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 leased signed by defendant at a property owned by plaintiff. Plaintiff claims that defendant failed to pay the rent from April 1, 2020 through the present. It contends it is owed \$162,905.65 for various unpaid charges, including the rent, water charges, utilities and other charges.

In opposition, defendant claims that there are numerous issues of fact that should compel the Court to deny plaintiff's motion. It argues that discovery is needed before plaintiff should be awarded summary judgment. Defendant also complains that the various governmental orders relating to the pandemic devastated its business. It contends that the temporary closure of its business due to these outside factors constitutes a "taking" and it should not have to pay the rent as a result. Defendant 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 September 21, 2020 and then operated in a limited capacity to the present.

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]).

Defendant did not submit anything on this motion that suggests that the executive orders issued during the pandemic comes close to a taking sufficient to defeat the instant motion. This is not a situation where the government condemned the building or tried to take the property via 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 September 2020.

The Court also finds that the doctrines of frustration of purpose and impossibility do not raise an issue of fact here. 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 struggled during the pandemic is not a basis to invoke either doctrine. Defendant's claim that it cannot make money has never been recognized as a valid justification to excuse a tenant's failure to pay rent. The doctrines cited above refer to situations where the entire basis of the contract cannot be fulfilled, such as where a government agency declares that a building must be demolished due to safety concerns. In that case, there would be no office in which defendant could operate its business. A temporary hardship, like the one described by defendant in this case, would vastly expand the reach of these doctrines if it could excuse a tenant's obligation to pay the rent. The Court declines to embrace that approach.

The Court also finds that there is no need for discovery. Plaintiff met its prima facie burden to show there was a lease and that defendant did not pay. Defendant does not deny that it signed the lease and hasn't paid the rent. Defendant's claim that discovery would reveal its tax returns (and subsequent losses) is not relevant here. The Court has no doubt that defendant, like many businesses across New York City, has faced significant hardship because of the pandemic. But that does not mean the Court should rip up a valid contract and let defendant walk away. While that outcome may be what defendant desires, it would require the Court to ignore the fundamental principles of contract law. For similar reasons, defendant's claim that the lease lacked consideration is rejected-- defendant retains use of the premises. The Court denies defendant's remaining objections.

The Court observes that in support of its motion, plaintiff submitted the affidavit of Eric Shalem (an officer of plaintiff) who included a table detailing how much plaintiff seeks (NYSCEF Doc. No. 10). 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

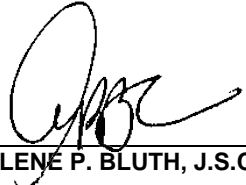
much plaintiff is owed. Without any specific objections, the Court grants plaintiff the amount it seeks.

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 \$162,905.62 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:

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