

N.Y. Park N. Salem Inc. v Vogrug LLC

2021 NY Slip Op 32395(U)

September 15, 2021

Supreme Court, New York County

Docket Number: Index No. 656614/2020

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 63M

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N.Y. PARK N. SALEM INC.	INDEX NO.	<u>656614/2020</u>
Plaintiff,	MOTION DATE	<u>05/28/2021</u>
- v -	MOTION SEQ. NO.	<u>002</u>
VOGRUG LLC,		
Defendant.		

**DECISION + ORDER ON
MOTION**

-----X

HON. LAURENCE LOVE:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41
 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced the instant action by the filing of a summons and complaint on November 30, 2020, seeking to recovery for alleged breaches of a commercial lease. Defendant interposed an answer on January 8, 2021, containing seven affirmative defenses and counterclaims seeking rescission and reformation based upon impossibility. Plaintiff now moves for an Order pursuant to CPLR § 3212, granting Plaintiff partial summary judgment, seeking on plaintiff's first and second causes of action, a judgment for the rent in the amount of \$198,580.09 and dismissal of Defendant's affirmative defenses and counterclaims.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 656614/2020 N.Y. PARK N. SALEM INC. vs. VOGRUG LLC
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35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, plaintiff submits the affidavit of Peter Nichols, the Managing Agent of plaintiff, N.Y. Park N. Salem, Inc., together with the relevant lease, amendment of lease, notice of default, and tenant ledger, which establish as follows: Plaintiff leases a commercial space located at 30 East 60th street, on the 15th Floor, New York, New York 10022 to defendant, pursuant to a lease dated December 1, 2016 for use as a hair salon. Articles 1 and 40 of the Lease provide that Tenant shall pay Monthly Fixed Rent in monthly installments of \$19,242.85 increasing to \$19,819.78 effective November 1, 2020. Defendant failed to pay to the Plaintiff the Monthly Fixed Base Rent as required in the Lease for the months April 2020 through April 2021. Plaintiff drew down upon the security deposit in the amount of \$35,218.76 on July 1, 2020 and applied it to the oldest unpaid Monthly Fixed Base Rent then outstanding, which was April 2020 and May 2020. By Notice of default November 16, 2020, Plaintiff notified Defendant of its default under the Lease and demanded that Defendant cure the default by promptly paying the past due amount of \$135,739.00 and demanded that Defendant replenish the security deposit in the amount

of \$35,218.76. Defendant has failed to make said payments. As such, plaintiff has established a *prima facie* entitlement to partial summary judgment.

In opposition, defendant submits the affidavit of Arsen Gurgov, a member of defendant, Vogrug, LLC, a copy of Executive Order 202.7, which temporarily closed all hair salons to the public, effective March 21, 2020, and correspondence from defendant's insurance carrier declining coverage for defendant's business losses arising out of the Covid-19 pandemic, together with a copy of the pleadings in a related action. The Court notes that defendant fails to deny any of the material facts established by plaintiff but does establish that the subject hair salon was closed for approximately four months.

The sole affirmative defenses which defendant raises that are relevant to the instant action are those of frustration of purpose/impossibility of performance, prior action pending, the Covid-19 pandemic as a casualty under article 9 of the Lease, and failure to credit amounts paid.

The frustration of purpose doctrine applies where the purpose was "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004). Said doctrine applies where "as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place." *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974); see also, *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dept 2011) (frustration of purpose applies "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract").

The doctrine of impossibility or impracticability applies where performance is "objectively" impossible due to the "destruction of the means of performance" by a force majeure

event or the enactment of law rendering performance illegal. See, *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 280 (1968) (holding that, "[g]enerally, however, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law"). The "impossibility" must be caused by "an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987).

Neither doctrine is applicable in the instant action. While defendant has established that both the purpose of the contract was frustrated and that use of the premises as a hair salon was briefly rendered illegal, the lease specifically guards against the circumstances at issue. Pursuant to Paragraph 27 of the lease,

This lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease, or to supply, or is delayed in supplying, any service expressly or impliedly to be supplied, or is unable to make, or is delayed in making, any repair, additions, alterations or decorations, or is unable to supply, or is delayed in supplying any equipment, fixtures, or other materials, if Owner is prevented or delayed from so doing by reason of strike or labor troubles or any cause whatsoever including, but not limited to, government preemption or restrictions, or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency, or by reason of the conditions which have been or are affected, either directly or indirectly, by war or other emergency.

Pursuant to footnote 13, supplementing Paragraph 27 of the lease,

Tenant shall not be deemed in default in the performance of any obligation or undertaking provided for herein (other than the payment of Fixed Rent or Additional Rent) in the event or so long as the performance of any such obligation is prevented or delayed, retarded or hindered by acts of God, fire, earthquake, floods, explosion, action of the elements, war, hostilities, invasion, insurrection, acts of terrorism, riot, mob violence, sabotage, inability to procure or a general shortage of labor, equipment, facilities,

materials or supplies in the open market, failure of transportation, lockouts, action of labor unions, condemnation, requisition laws, orders of government or civil military or naval authorities or any other cause, whether similar or dissimilar to the foregoing, not within the reasonable control of Tenant.

As both Paragraph 27 of the lease and footnote 13 both contain carve-outs requiring the continued payment of rent in the instant situation, defendant cannot use same to establish an issue of fact precluding summary judgment.

Tenant claims that the casualty clause of the Lease (Paragraph 9) also precludes plaintiff's claims, citing, *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2020 NY Slip Op 33623(U), 4 (Sup. Ct. NY Co. 2020). The Court notes that after the submission of defendant's opposition papers, said Order was reversed by the Appellate Division, First Dept., which held "... 'plaintiff is not entitled to a rent abatement under the lease "due to loss of use of all or a portion of the Demised Premises due to [a] Casualty[.]' That portion of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown (see *Gap Inc. v. Ponte Gadea New York LLC*, — F.Supp.3d —, 2021 WL 861121, [S.D. N.Y. 2021]; *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) 2020 WL 7137817 [Sup. Ct., N.Y. County 2020]; *Dr. Smood New York LLC v. Orchard Houston, LLC*, 2020 N.Y. Slip Op. 33707(U), 2020 WL 6526996 [Sup. Ct., N.Y. County 2020]; but see *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, 2020 N.Y. Slip Op. 34311(U), 2020 WL 7629597 [Sup. Ct., N.Y. County 2020])." *Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575 (2d. Dept. 2021). As such, defendant's contentions are without merit on the issue of casualty. Based upon same, defendant's contention that plaintiff breached the lease by failing to abate the rent is similarly without merit.

Defendant’s second affirmative defense claims that this action may not be maintained by virtue of a prior action pending between the parties entitled ADBH 22nd Floor, Inc. et. al. v. N.Y. Park N. Salem, Inc., Index No. 650978/2020, the crux of which is that the Plaintiff is improperly seeking additional charges, including late fees and legal fees, from the Tenant here, in connection with a “Cooling Tower” that Plaintiff erected on the roof of the Building. Said contention is without merit as " ‘New York does not have a compulsory counterclaim rule,’ and, thus, a ‘defendant who fails to assert a counterclaim is not barred . . . from subsequently commencing a new action on that claim’ (*Wax v. 716 Realty, LLC*, 151 AD3d 902, 904 [2d Dept 2017]) nor should the issues in this action be considered with the prior action which involves the interests of numerous other tenants in the premises.

The Court has considered defendant’s additional contentions and finds them to be without merit. As such, it is hereby

ORDERED that the plaintiff’s motion for partial summary judgment on plaintiff’s first and second causes of action, is GRANTED and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$198,580.09 together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant’s affirmative defenses and counterclaims are hereby DISMISSED.

9/15/2021
DATE


LAURENCE LOVE, J.S.C.

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