

ESRT 10 Union Sq., L.L.C. v James Hill, Inc.
2022 NY Slip Op 30061(U)
January 11, 2022
Supreme Court, New York County
Docket Number: 156496/2020
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

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INDEX NO. 156496/2020

ESRT 10 UNION SQUARE, L.L.C.
Plaintiff,

MOTION DATE 07/21/2021

MOTION SEQ. NO. 001

- v -

JAMES HILL, INC., A NEW YORK CORPORATION D/B/A
THE UPS STORE,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff ESRT 10 Union Square LLC brings this action for breach of contract against its former commercial tenant, James Hill, Inc., d/b/a The UPS Store. In motion sequence 001, Plaintiff moves for summary judgment. The motion has been fully submitted.

Background

Plaintiff is the landlord of a retail unit located at 118 East 15th Street, New York, NY 10003 ("the premises") and alleges that Defendant is the current commercial tenant thereof via a lease assignment dated November 16, 2017. (NYSCEF Doc Nos. 13, Lease; 17, Assignment.) Pursuant to the third amendment of the lease, annual rent was fixed at \$145,351.00 per annum until the lease's expiration on April 30, 2023. (NYSCEF Doc No. 16, Third Am., at §§ 2-3.)

Plaintiff commenced this action on August 17, 2020, setting forth causes of action for breach of contract, continuing damages, and attorneys' fees. (NYSCEF Doc No. 1, Complaint, at ¶¶ 11-21.) At that time, Plaintiff alleged that Defendant, which has remained in possession of the

premises, owed \$98,164.77 in fixed and additional rent, plus \$24,202.90 for the replenishment of the security deposit, for a total of \$122,367.67. (Complaint at ¶ 9.)

Defendant answered, asserting as affirmative defenses: 1) the doctrines of force majeure, impossibility, and frustration of purpose, due to the COVID-19 pandemic; 2) that Plaintiff breached the lease by failing to perform certain unspecified repairs; and 3) that it would be a violation of public policy and otherwise unconscionable to require it to pay rent, as it would have been “illegal” to have kept his store open due to governmental restrictions. (NYSCEF Doc No. 2, Answer, at ¶¶ 4-8.) Plaintiff moves for summary judgment.

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [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 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are issues of fact and not to delve into or resolve issues of credibility. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012].) Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be

granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].)

Plaintiff has met its initial burden in demonstrating its entitlement to summary judgment against Defendant by submitting the original lease agreement, the lease amendments, the lease assignment, an affidavit of Maxx Melendez, an accounts receivable associate employed by Plaintiff (NYSCEF Doc No. 8), and a ledger demonstrating that Defendant owed \$204,814.89 as of April 7, 2021. (NYSCEF Doc No. 18.) (*See WG & Associates Management & Development LLC v Deaibes*, 2021 WL 3485799, at *1 [Sup Ct, NY County, Aug 2, 2021].) Plaintiff's proof demonstrates the existence of a contract, its performance under the contract, Defendant's breach of the contract, and resulting damages. (*SLG Graybar Mesne Lease LLC v Arthur V. Fox CPA, PC*, 2021 WL 3772714, at *2 [Sup Ct, NY County, Aug 24, 2021].)

Notably, in its opposition, Defendant does not dispute the amount owed, but instead argues that the COVID-19 pandemic constitutes a "casualty" as defined in paragraph 9 of the lease, which precludes summary judgment. (NYSCEF Doc Nos. 30-31, Opposition.) However, New York courts have already considered and rejected this argument. (*111 Fulton Street Investors, LLC v Fulton Quality Foods LLC*, 2021 WL 408238, 2021 NYLJ LEXIS 113 [Sup Ct, NY County, Feb 5, 2021] [rejecting defendant's argument that COVID-19 qualifies as a casualty, as those provisions refer to "damage to the building (such as a fire) that renders the commercial space unusable"]; *see also Benny's Famous Pizza Plus Inc. v Security National Ins. Co.*, 72 Misc 3d 1209[A], at *4 [Sup Ct, King's County, July 1, 2021] ["all New York courts applying New York law ... have soundly rejected the argument that business closures due to the presence of the COVID-19 virus or due to New York State Executive Orders constitute physical loss or damage

to property ... the mere presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself.”.)

Defendant’s affirmative defenses are likewise unavailing. First, the lease does not include a force majeure clause, and thus that affirmative defense is inapplicable. (*Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987] [“contractual force majeure clauses ...excus[e] nonperformance ... only if the force majeure clause specifically includes the event that actually prevents a party's performance”].) The doctrine of impossibility does not excuse a commercial tenant from paying rent due to the COVID-19 pandemic. (*A/R Retail LLC v Hugo Boss Retail, Inc.*, 149 NYS3d 808, 826-27 [Sup Ct, NY County, May 19, 2021 [“A number of courts have rejected the impossibility defense as an excuse for tenants not performing contractual obligations, such as payment of rent, during the COVID-19 pandemic”].) Finally, Defendant’s argument that Plaintiff breached its obligations under the lease to make certain repairs is unsubstantiated. (*See* NYSCEF Doc No. 30 at 4 [“The Landlord only wants his rent, while I cannot go to the bathroom in the store!”].) Article 4 of the lease provides that it is the Defendant’s obligation to make repairs, and, further, that there “shall be no allowance to the Tenant for the diminution of rental value” for the failure of any party to do so. (Lease at 3.) Lastly, Defendant’s business, a mail delivery service, was considered essential during the COVID-19 pandemic and therefore was not, in fact, forced to shut down.

The court also finds that Plaintiff is entitled to reasonable attorneys’ fees pursuant to Article 18 (“Fees and Expenses”) of the lease. (Lease at 5.) However, Plaintiff has not submitted a bill of costs. Thus, it is hereby

ORDERED that Plaintiff’s motion sequence 001 for summary judgment is granted in its entirety pursuant to the terms below; and it is further

ORDERED that Plaintiff is directed to electronically file a proposed order and judgment, with an attorney's affidavit and bill of costs in support thereof, within 15 days of the date of this order; and it is further

ORDERED that Defendant's affirmative defenses and counterclaim are dismissed.

January 11, 2022
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE