

**ESRT Empire State Bldg., L.L.C. v McKay Bros.,
L.L.C.**

2022 NY Slip Op 30139(U)

January 18, 2022

Supreme Court, New York County

Docket Number: Index No. 152199/2021

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 152199/2021

ESRT EMPIRE STATE BUILDING, L.L.C.,
Plaintiff,

MOTION SEQ. NO. 001

- v -

DECISION + ORDER ON MOTION

MCKAY BROTHERS, L.L.C.,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS

In this action seeking to recover damages based on breach of a license agreement, defendant moves, pre-answer, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss all claims asserted against it. (NYSCEF Doc. Nos. 3-13, 24, moving papers and reply). Plaintiff opposes same. (NYSCEF Doc. Nos. 14-23, opposition papers). After a review of the relevant statutes and case law, the motion is decided as follows.

The salient facts of this case are summarized as follows. Plaintiff is the owner of the premises located at 350 Fifth Avenue, New York, NY 10118 ("the premises" or "the building") and, in January 2020, the parties executed a "License Agreement for Telecommunications Services and Equipment," whereby plaintiff allowed defendant to install certain antennas, cables and equipment in and on the building to provide low latency telecommunications services to its customers in the financial services industry. (NYSCEF Doc. No. 7, license agreement).

As relevant to the present motion, Article 2(b) of the license provided, in relevant part, that:

"Licensee may terminate the Term of this Agreement with thirty (30) days' prior notice to the Owner, in the event that Licensee is prohibited from installing or maintaining Licensee's Equipment by governmental law, rule or regulation, or due to any other cause beyond the reasonable control of Licensee; provided, however, if Licensee would not be so prohibited by making non-material modifications or alterations or the like to Licensee's Equipment or the manner of installation thereof or by obtaining, in Licensee's reasonable discretion, minor permits or variances or the like for such installation or maintenance, then Licensee shall have no such right to terminate."

By letter dated April 15, 2020, defendant notified plaintiff that, pursuant to paragraph 2(b) of the license, it was providing thirty (30) days' notice of its termination of the agreement, claiming that Executive Order 202.6, issued by former Governor Cuomo in March 2020, prohibited defendant from installing its equipment at the premises. (NYSCEF Doc. No. 10, April

15, 2020 letter). Plaintiff rejected said notice on the ground that defendant's reliance on Executive Order 202.6 to cancel the license was misplaced. (NYSCEF Doc. No. 11, April 28, 2020 letter).

In the instant motion, defendant argues that the express language of the license, as well as, the subject Executive Order and accompanying guidelines issued by the Empire State Development Corporation ("ESD"), conclusively establish, as a matter of law, its entitlement to dismissal of this action under CPLR 3211(a)(1) and (a)(7). Defendant also claims that, based on the foregoing, this court should award attorney's fees and costs, and sanction plaintiff for commencing this frivolous action. (NYSCEF Doc. No. 4, memorandum of law in support).

In opposition to the motion, plaintiff contends, *inter alia*, that Executive Order 202.6 did not prevent defendant from installing its equipment or operating its telecommunications business. Executive Order 202.6 identifies "telecommunication" as an essential business and, thus, defendant was not subject to in-person restrictions. The ESD guidelines define "telecommunications" and other utilities as an "essential infrastructure" and further provides that "[e]ssential construction may proceed, to the extent that . . . the construction is for existing (i.e., currently underway) projects of an essential business." (NYSCEF Doc. No. 9 ¶¶ 2, 9, ESD guidelines). According to plaintiff, Article 2(b) of the license only afforded defendant a right to terminate the license if the purpose of the license was frustrated and, thus, is not triggered by a temporary pause on construction activities in New York State. Lastly, plaintiff maintains that defendant has failed to establish a basis for legal fees and that its demand for sanctions lacks merit. (NYSCEF Doc. No. 17, memorandum of law in opposition).

Plaintiff submits the affidavit of Maxx Melendez, its accounts receivable collections associate, who affirms that, based on the ledger generated and maintained in the regular course of plaintiff's business, defendant's last payment was in June 2020 and that defendant violated the license by failing to pay any additional license fees. (NYSCEF Doc. No. 15, Melendez's affidavit; 22, Ledger). Plaintiff also submits the affidavit of Richard Hauser ("Hauser"), its Broadcasting, Communications and Infrastructure Manager, who affirms that defendant had the ability, since January 14, 2020, to use and occupy the licensed space (NYSCE Doc. No. 16, Hauser's affidavit). Defendant was responsible, claims Hauser, for obtaining the required permits to use the premises and, insofar as it "had submitted paperwork to New York City and to Landmarks," the construction projects was "ongoing" and thus, not subject to the subject executive order. Hauser also claims that "other licensees at the [premises] . . . have operated telecommunications equipment continuously from January 14, 2020 to date" and that "[p]laintiff performed major antenna removal work with no interruption from the pandemic or the Governor's order." Hauser affirmed that defendant could have requested confirmation from New York State that it was essential and provides the example of CBS TV, which also operates on the premises. He states, "[t]heir contractor, Advent Industrial, filled out the DOB forms requesting that the project be considered essential and they received a prompt response confirming that the work was essential and they were allowed to continue with no interruption." (NYSCEF Doc. No. 16, Hauser's affidavit).

In reply, defendant argues that plaintiff's opposition papers should be disregarded as untimely. Even assuming, *arguendo*, this court were to consider the opposition papers,

defendant asserts that the opposition papers nevertheless support defendant's entitlement to dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Specifically, defendant argues that Article 2(b), which plaintiff relies on to claim that the delay caused by the subject executive order would be a non-material modification to the manner of installation that does not warrant termination of the license, is inapplicable to the facts here because defendant is not claiming any delays but, rather, a prohibition as of the date of termination. Moreover, although defendant does not dispute that it is an essential business within the meaning of the executive order, defendant contends that "[i]t is undisputed that permits had not yet been issued and construction had not yet commenced at the time of the [e]xecutive [o]rders. Thus, contrary to [p]laintiff's argument, which is essential to its claim, construction was not 'currently underway.'" It also maintains that the fact that it paid fees beyond the date of termination does not warrant a different result. Defendant also argues that the affidavits of Hauser and Melendez are red herrings that are irrelevant to the issues before the court. The unambiguous license agreement, claims defendant, afforded it an absolute right to terminate the license given the government prohibition. (NYSCEF Doc. No. 24, *reply memorandum of law*).

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*see* CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) However, "(w)hen documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it has one." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal quotation marks and citations omitted].) "[I]f the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is *flatly rejected* by the documentary evidence), dismissal would be appropriate." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 135; *see* *Weksler v Weksler*, 81 AD3d 401, 402 [1st Dept 2011].) Moreover, a motion to dismiss a complaint, pursuant to CPLR 3211(a)(1), may be granted only when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. (*see* *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000].)

Here, as an initial matter, this court will consider plaintiff's untimely opposition papers given that defendant has had an opportunity to address the arguments therein in its reply papers and, thus, will not be prejudiced. (*see* CPLR 2001). Upon this court's review of the arguments advanced in the moving papers, the application is denied. Defendant fails to conclusively establish that it was "prohibited from installing or maintaining [l]icensee's [e]quipment by governmental law, rule or regulation," such that Executive Order 202.6 triggered a contractual right to terminate the license agreement. Undisputedly, defendant is an essential business within the meaning of Executive Order 202.6. Although defendant now argues that the motion should

be granted, reasoning that no essential construction was "underway" given that it had not yet obtained all necessary permits to commence installation, the argument is rejected. This court notes that, effective January 14, 2020, the premises were delivered to defendant, and defendant fails to establish that it was prevented, either by governmental law, rule or regulation, from installing its equipment or operating its telecommunications business. Even if, *arguendo*, Executive Order 202.6 caused delays in the issuance of permits, defendant nevertheless fails to demonstrate that the temporary pause occasioned by the executive order is the type of governmental interference contemplated by the license agreement. Thus, after considering the arguments raised in the moving papers and, affording plaintiff the benefit of every favorable inference, the motion is denied in its entirety. All other remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

ORDERED that, within twenty (20) days after service of this decision and order, defendant shall interpose an answer; and it is further

ORDERED that the parties are directed to participate in a remote conference on March 30, 2022, details which shall be provided no later than March 29, 2022.

This constitutes the decision and order of this court.

January 18, 2022


HON. VERNA L. SAUNDERS, JSC

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