

**800 Third Ave. Assoc., LLC v Roadrunner Capital Partners LLC**

2022 NY Slip Op 30183(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 650607/2021

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  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

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800 THIRD AVENUE ASSOCIATES, LLC

Plaintiff,

- v -

ROADRUNNER CAPITAL PARTNERS LLC,

Defendant.

-----X

INDEX NO. 650607/2021

MOTION DATE 08/18/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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

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

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

Plaintiff commenced the instant action by filing a summons and verified complaint on January 27, 2021 alleging causes of action for 1) unpaid rent 2) unpaid rent accruing during the pendency of this action, and 3) attorney’s fees. As described in plaintiff’s complaint, plaintiff is the owner of the commercial building located at 800 Third Avenue, New York, New York (the "Building"). Defendant is the tenant of the entirety of the tenth floor in the Building pursuant to a written lease dated June 4, 2009, made between Plaintiff as landlord, and defendant, as tenant ("Lease"). The Lease was subsequently extended to November 30, 2021. Beginning in April, 2020, defendant failed to make the required rental payments pursuant to the lease in their full amount. Defendant interposed an answer on April 23, 2021, containing twenty-one affirmative defenses and a counterclaim seeking attorney’s fees.

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 \$800,477.58, partial summary judgment on the issue of liability on plaintiff's third cause of action seeking attorney's fees and dismissal of Defendant's affirmative defenses.

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 35 (1<sup>st</sup> 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 Richard Teichman, an employee of Joseph P. Day Realty Corp, the Managing Agent of plaintiff, 800 Third Avenue Associates, LLC, together with the relevant lease, extension of lease, ledger, electric bills, and tax bills, which establish as follows: Defendant is the tenant of the entirety of the tenth floor in the Building ("Premises") pursuant to a written lease dated June 4, 2009, made between Plaintiff as landlord, and defendant, as tenant ("Lease"). The Lease was subsequently extended to November 30, 2021,

pursuant to a lease modification agreement dated June 3, 2014. Defendant last paid rent in March 2020. Pursuant to the lease, the monthly base Annual Rent was \$101,237.36 for the period from December 1, 2019 through November 30, 2020, and is \$103,009.02 for the period from December 1, 2020 through November 30, 2021, together with electric charges and a percentage of the Building's real estate tax escalations. As of June, 2021, defendant owes a total of \$800,477.58. Pursuant to the Lease at Paragraph "19", Tenant also agreed to pay, as additional rent, Plaintiff's attorneys' fees. As such, plaintiff has established a *prima facie* entitlement to partial summary judgment.

In opposition, defendant submits the affidavit of Richard Schottenfeld, the Managing Member of Defendant-Tenant Roadrunner Capital Partners LLC, in support of defendant's affirmative defenses consisting of an alleged oral reduction in rent, plaintiff's alleged failure to put safety precautions in place, plaintiff's alleged failure to comply with notice provisions in the lease, frustration of purpose/impossibility of performance, and the Covid-19 pandemic as a casualty under article 9 of the Lease. The Court notes that defendant's affidavit lacks any supporting documentation.

Paragraphs 21, 25, and 45 of the lease specifically prohibit oral modifications of the lease, waivers of rent payments not in writing and waiver occasioned by the owner's acceptance of a lesser amount. As such, Defendant's argument alleging a waiver of 50% of the rent due under the Lease and Defendant's argument that it was released from further liability under the Lease are without merit.

Pursuant to Article 29(f) of the Lease, "Owner reserves the right to stop services of the heating, elevators, plumbing, air conditioning, electric, power systems or cleaning or other services, if any, when necessary by reason of accident or for repairs, alterations, replacements or

improvements necessary or desirable in the reasonable judgment of Owner for as long as may be reasonably required by reason thereof.” As such, defendant cannot establish claims related to the HVAC system and the elevator. Defendant’s allegation that plaintiff failed to send copies of the monthly rent bills to defendant is similarly unavailing. There is no requirement under the lease that monthly rent bills even be sent to defendant and there is certainly no legitimate basis to conclude that defendant did not receive same.

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 an office 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.

As Paragraph 27 of the lease contains a carve-out 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*, 524 F.Supp.3d 224 [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.

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 cause 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 \$800,477.58, together with interest at the rate of 9% per annum from the date of June 2, 2021 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, 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; and it is further

ORDERED that an assessment of damages against defendant is directed on the issue of attorney’s fees and additional unpaid rent, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is directed, upon the filing

of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

1/20/2022

DATE



LAURENCE LOVE, 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