

Uniway Partners, L.P. v Buttercup Blackberry, Inc.
2022 NY Slip Op 30245(U)
January 14, 2022
Supreme Court, New York County
Docket Number: Index No. 651839/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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INDEX NO. 651839/2021

UNIWAY PARTNERS, L.P.
Plaintiff,

MOTION DATE 07/08/2021

MOTION SEQ. NO. 001

- v -

BUTTERCUP BLACKBERRY, INC.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY

I. INTRODUCTION

In this action seeking, inter alia, \$132,538.50 in damages for a breach of a commercial lease, the plaintiff-landlord, Uniway Partners, L.P., moves (1) for summary judgment on the complaint as against the defendant, Buttercup Blackberry, Inc., a tenant who remains in possession, (2) contractual attorney's fees and expenses, (3) dismissal of the defendant's ten affirmative defenses and (4) use and occupancy while the action is pending. The defendant opposes the motion. The motion is granted in part.

II. BACKGROUND

On March 1, 2018, the parties entered into a ten-year commercial lease for ground floor and basement space in a property located at 61 East 8th Street in Manhattan. The lease expires on February 29, 2028. The defendant operates a bake shop in the space. Pursuant to Article 53, the monthly base rent was \$8,840.33 for the period March 1, 2020 to February 28, 2021, and \$9,106.06 for the period March 1, 2021, to February 28, 2022. Pursuant to Article 54, real estate taxes attributable to the leased premises were to be paid by the tenant. Pursuant to Articles 28 and 56, water charges were additional. The tenant paid a \$25,000.00 security deposit which, pursuant to Article 60, was to be replenished if used to satisfy any default. Paragraph 26 of the lease provides that the tenant's obligation to pay rent shall in no way "be affected, impaired or excused because owner is unable to fulfill any of its obligations under the lease ... by reason of government preemption or restrictions."

The defendant's bakery business was impacted by the COVID-19 pandemic and consequent closures. According to the defendant, the bakery was closed starting in March 2020 through early 2021, save for a brief re-opening in the fall of 2020, due to lack of customers and available employees.

By letter dated August 28, 2020, the plaintiff notified the defendant that it was in default on the fixed rent in the

sum of \$45,824.16, having paid none since February 2020, and demanded immediate payment. None was made. On September 10, 2020, the plaintiff applied the \$25,000.00, security deposit to the outstanding balance as per the lease terms. The plaintiff alleges that the defendant continued to default through April 1, 2021, accruing total unpaid rent and additional rent of \$107,538.50, and failed to replenish the \$25,000.00 security deposit, for a total outstanding balance of \$132,538.50.

The plaintiff commenced this action on March 19, 2021.

In its complaint, the plaintiff alleges three causes of action - for (1) breach of the lease, (2) continuing damages for amounts accrued after commencement of the action, and (3) contractual attorney's fees and expenses incurred in prosecuting this action.

The defendant answered and asserted ten affirmative defenses - (1) failure to state a cause of action, (2) "frustration of purpose, impossibility of performance, and/or rescission", (3) defenses founded in documentary evidence, (4) no claim upon which relief can be granted, (5) statute of limitation, laches, waiver, (6) unclean hands, (7) culpable conduct of plaintiff, (8) failure to mitigate damages, (9) no claim upon which attorney's fees can be granted, and (10) set-off of damages. The defendant maintains that its lease obligations were "suspended by plaintiff's conduct and

statements" made during a prolonged and unsuccessful attempt to re-negotiate the lease terms. The defendant does not state whether it applied for or received a PPP loan or grant or obtained any other funds from a government source.

The plaintiff filed the instant motion on May 18, 2021, seeking the relief as set forth above and \$132,538.50 in damages plus attorney's fees. The defendant opposes the motion, arguing that there is no breach, the motion is premature since discovery has not taken place, triable issues of fact are presented and its affirmative defenses are properly pleaded and meritorious.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra.

B. The Plaintiff's Motion

In support of the portion of its motion seeking summary judgment, the plaintiff submits, *inter alia*, the lease, account ledger and default notice referable to the subject property, and the affidavit of Augi Yi, an accounts receivable collections associate for ESRT Management LLC, the managing agent for the property. These submissions establish, *prima facie*, the cause of action for breach of contract by demonstrating (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). It is well settled that a lease is a contract which is subject to the same rules of construction as any other agreement. See George Backer Mgt. Corp. v Acme Quilting Co., Inc., 46 NY2d 211 (1978); New York Overnight Partners, L.P. v Gordon, 217 AD2d 20 (1st Dept. 1995), aff'd 88 NY2d 716 (1996). The plaintiff's proof established entitlement to summary judgment under the terms of the parties' lease and damages of \$132,538.50. As set forth more fully below, the defendant fails to raise any triable issue to defeat the motion.

(1) There Is No Enforceable Settlement Agreement

The defendant's primary contention, that the parties' ongoing settlement negotiations relieved it of its obligations under the lease and raises issues of fact for trial, is without merit. "To establish the existence of an enforceable agreement, a [party] must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 N.Y. Jur. 2d, Contracts § 9)." Kowalchuk v Stroup, 61 AD3d 118, 121 (1st Dept. 2009). The defendant does not dispute that it failed to pay rent and additional rent since February 2020 and that a final written agreement was never reached with the plaintiff. It even submits the unsigned agreement, along with an affidavit of Hazem Elgohary, its president and chief operating officer, who describes the "prolonged negotiations" he engaged in on behalf of the defendant starting in June 2020 and continuing through January 2021. At that time, Augi Yi provided Elgohary with a proposed "rent waiver agreement." Elgohary declined to sign it because it did not include a provision that rent could be re-negotiated at a later date and he feared that the defendant's sales numbers would not support a sudden return to the higher pre-pandemic rents. Thus, the plaintiff's offer was admittedly rejected by the defendant for what it viewed as unfavorable terms. Under these circumstances, the defendant can not

reasonably argue that its unsuccessful negotiation relieved it of its contractual obligations, nor could it legally have that effect. Moreover, any purported oral settlement is barred by Article 70(c) of the lease, which provides that the lease may not be changed, modified, amended, cancelled or terminated orally, but only in writing and signed by the parties. "Where a lease contains a clause requiring that any modification of the terms of such lease to be in writing signed by the landlord, an oral modification is generally precluded." Joseph P. Daly Realty Corp. v Jeffrey Lawrence Assocs., Inc., 270 AD2d 140, 141 (1st Dept. 2000); see Richardson & Lucas, Inc. v New York Athletic Club, 304 AD2d 462 (1st Dept. 2003); Two Wall Street Assocs. Limited Partnership v Anderson, Raymond & Lowenthal, 183 AD2d 498 (1st Dept. 1992); General Obligations Law 15-301(1).

(2) Summary Judgment is Not Premature

The defendant's contention that the plaintiff's motion should be denied as premature under CPLR 3212(f) is meritless. Although this motion was made before discovery was commenced, the defendant "fails to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery."

Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). Here, the defendants have failed to do so and it is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See State ex rel Perkins v Cooke Center for Learning & Dev., Inc., 164 AD3d 445 (2018); Tavares v Herrasme, 140 AD3d 453 (1st Dept, 2016); Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Kent v 534 East 11th Street, supra. Notably, the defendant's principal was a party to, and had firsthand knowledge of, the very negotiations it claims precludes the granting of summary judgment, and the defendant even produces some of those communications along with the unsigned "rent waiver agreement." It fails to identify any other type or source of evidence that would support its position on the motion.

(3) Dismissal of the Defendants' Affirmative Defenses

The branch of the plaintiff's motion seeking dismissal of the defendant's affirmative defenses is also granted. Initially, the court notes that all ten of the defendant's ten affirmative defenses are improperly asserted in a conclusory manner without any detail or factual allegations. See Commissioners of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Manufactures Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). For example, for the first affirmative defense, the defendant

alleges only "the complaint fails to state a cause of action."
For the second affirmative defense, the defendant states only
"the plaintiff's claims are barred, in whole or part, because of
the doctrines of frustration of purpose, impossibility and/or
rescission." For the third affirmative defense, the defendant
alleges only that the plaintiff's claims "are refuted in whole
or part, by documentary evidence."

CPLR 3013 expressly requires that all "statements in a
pleading shall be sufficiently particular to give the court and
parties notice of the transactions, occurrences, or series of
transactions or occurrences, intended to be proved and the
material elements of each cause of action or defense." For that
reason, "summary judgment cannot be avoided on the basis of
general, conclusory and unsubstantiated allegations." US 7 Inc.
v Transamerica Ins. Co., 173 AD2d 311, 312 (1991); see
Commissioners of State Ins. Fund v Ramos, supra.

Furthermore, to the extent they can be discerned, the
defenses are without merit. Contrary to the first affirmative
defense, the complaint clearly states a cause of action for
breach of contract and resulting damages. Indeed, the court has
found as a matter of law that the plaintiff is entitled to
summary judgment on that breach of contract claim. As to the
second affirmative defense, to the extent the defendant is
alleging that there was a frustration of purpose of the lease

due to the COVID-19 pandemic and consequent closures, such arguments have not been successful.

The frustration of purpose doctrine “offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract.” Structure Tone, Inc. v Universal Services Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). “In order to invoke the doctrine of frustration of purpose, 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.” Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted). Importantly, frustration of purpose is not available “where the event which prevented performance was foreseeable and provision could have been made for its occurrence.” Id. at 43 (quoting Warner v Kaplan, supra at 6) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021); 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021).

In any event, as previously stated, Paragraph 26 of the lease makes clear that the tenant's obligation to pay rent is not excused even if the owner cannot meet its own obligations under the lease by reason of a government restriction, such as the temporary one here. As further observed by the plaintiff, this is a ten-year lease term and, save for the few months that the defendant was forced by a government order to close the bakery, the premises were open and available to the defendant.

As to the third affirmative defense, the defendant proffers no document in its defense that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). The e-mails and other communications and the unsigned agreement attached as exhibits to an affidavit merely confirm and illustrate that the parties had ongoing negotiations, which ultimately failed.

The court has considered the defendant's remaining contentions in regard to the affirmative defenses and finds them to be unavailing for reasons stated in the plaintiff's papers. Thus, dismissal of all ten affirmative defenses is warranted.

(4) Attorneys' Fees are Warranted

The court finds that the plaintiff's submissions support an award of contractual attorney's fees.

It is well settled that attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976); see also Goldberg v Mallinckrodt, Inc., 792 F2d 305 (2nd Cir. 1986); Rich v Orlando, 108 AD3d 1039 (4th Dept. 2013). There is a such contractual provision in the subject lease. Article 19 of the lease expressly provides that, upon a default by the tenant, the owner may recover any attorney's fees incurred in prosecuting an action or otherwise enforcing the plaintiff's rights under the lease.

However, the amount due to the plaintiff has not been established. In its papers, the plaintiff has variously requested \$6,137.00 and \$22,570.00, and submits some billing records but neither the records nor affirmations clearly support or explain the particular amounts requested. The plaintiff may submit supplemental papers in support of the attorney's fees application within 30 days, with notice of any such filing to the Part 42 Clerk.

(5) Use and Occupancy Granted

Section 220 of the Real Property Law provides that “[t]he landlord may recover a reasonable compensation for the use and occupation of real property” per an agreement other than a deed. Further, “[a] court has broad discretion in awarding use and occupancy *pendente lite* (Alphonse Hotel Corp. v 76 Corp., 273 AD2d 124 [1st Dept, 2000]).” 43rd Street Deli v Paramount Leasehold, L.P., 107 AD3d at 501 (1st Dept. 2013). “In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative (Beacway Operating Corp. v Concert Arts Society, 123 Misc 2d 452, 453 [Civ Ct, NY County 1984]; see also Eli Haddad Corp. v Redmond Studio, 102 AD2d 730, 731 [1st Dept. 1984]).” Mushlam, Inc. v Nazor ,80 AD3d 471, 472 (1st Dept. 2011).

Under the circumstances presented, including the parties’ lease terms, the defendant’s continued occupancy of the premises and lack of defenses, and the other relief granted herein, the court directs the defendant to pay to the plaintiff use and occupancy of \$9,000.00 per month commencing February 1, 2022, and continuing until the matter is disposed.

No relief is expressly requested and none is granted on the second cause of action of the complaint, seeking rent and

additional rent accrued after April 1, 2021. That claim is severed and shall continue.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is hereby, ORDERED that so much of the plaintiff's motion as seeks summary judgment on the first cause of action of the complaint and dismissal of the defendant's affirmative defenses is granted, and it is further

ORDERED the Clerk shall enter judgment in favor of the plaintiff and against defendant in the sum of \$132,538.50, for unpaid rent and additional rent through April 1, 2021, with statutory interest from April 1, 2021; and it is further,

ORDERED that so much of the plaintiff's motion as seeks summary judgment on the third cause of action for attorney's fees and expenses is granted as to liability, and the plaintiff may submit supplemental papers in support of the application within 30 days of the date of this order, with notice to the Part 42 Clerk of any such filing, and it is further

ORDERED that the plaintiff's application for use and occupancy is granted to the extent that the defendant is directed to pay use and occupancy for the subject premises in the sum of \$10,000.00 per month, commencing on November 1, 2021,

and continuing until the matter is disposed or until a further order of this court is issued in that regard, and it is further

ORDERED that the second cause of action of the complaint is severed and shall continue, and it is further

ORDERED that any relief not expressly granted herein is denied.

This constitutes the Decision and Order of the court.

DATED: January 14, 2022



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON