Webway Assoc. LLC v 109 W. Broadway Food & Wine LLC
2022 NY Slip Op 30606(U)
February 10, 2022
Supreme Court, New York County
Docket Number: Index No. 654202/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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WEBWAY ASSOCIATES LLC

Plaintiff,

- v -

109 WEST BROADWAY FOOD & WINE LLC,

Defendant.

INDEX NO. 654202/2020

MOTION DATE 12/31/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

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

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

I. INTRODUCTION

In this action wherein the plaintiff landlord seeks, *inter alia*, to recover damages for breach of a commercial lease agreement, the plaintiff moves pursuant to CPLR 3212 for summary judgment (1) on the first cause of action in the sum of $246,654.02 for unpaid rent and additional rent due through July 2020 and (2) on the second cause of action for attorneys' fees in a sum to be determined after a hearing. The plaintiff further seeks to strike the defendant's affirmative defenses and to dismiss the defendant's counterclaim. The defendant opposes the motion. The motion is granted in part.

II. BACKGROUND

The parties entered into a written lease agreement on March 23, 2010, for a fifteen-year term that is currently set to expire on April 30, 2025 (the lease). The defendant agreed to use and occupy the subject premises, which is located at 109 West Broadway in Manhattan (the

premises), for "any legal use…including, without limitation, a restaurant…for the sale of food and drink including alcoholic beverages and a cigar bar for on-premises and off-premises consumption…and for storage, seating, eating, drinking and food preparation…and for use as a nail salon/spa on the second floor."

In the preamble of the lease, the defendant agreed to pay all rent "without any deduction or setoff whatsoever." An analogous provision appears in Article 78 of the lease. Article 78 further specifies,

> Except as expressly set forth in this lease, the obligations and liabilities of the Tenant hereunder in no way shall be released, discharged or otherwise affected by reason of: … any restriction on or interference with any use of the Demised Premises or any part thereof, including, but not limited to, any zoning restrictions or regulations…. Tenant waives all rights now or hereafter conferred by statute or otherwise to quite, terminate or surrender this lease or the Demises Premises or any part thereof, or to receive any abatement (except as expressly set forth in this lease), suspension, deferment, diminution or reduction of any base annual or additional rent payable by Tenant hereunder.

Similarly, Article 26 of the lease provides that the defendant's obligation to pay rent under the lease shall not be excused based on the plaintiff's inability to fulfill its obligations under the lease "if Owner is prevented or delayed from so doing by reason of … government preemption or restrictions or by reason of any rule, order or regulation of any department or subdivision thereof of any governmental agency or by reason of the conditions of which have been or are affected, either directly or indirectly, [or] by war or other emergency…" Insert No. 7 of the lease contains a clause likewise providing that the defendant's obligation to pay rent shall not be excused by reason of, *inter alia*, "government preemption or restrictions or by reason of any rule, order of regulation of any department or subdivision thereof of any government agency or by reason of the conditions of which have been or are affected, either directly or indirectly, by

war or other emergency, or by any other event of force majeure or any other condition beyond Tenant's reasonable control."

Notwithstanding the foregoing, Article 101 of the lease sets forth the following exception to the defendant's rent obligations:

> 101. ABATEMENT RE: INTERRUPTION OF BUSINESS. Notwithstanding anything to the contrary contained in this lease, provided Tenant is not in default (after the expiration of any applicable notice and cure periods) under the terms, provisions, covenants and conditions of this lease, if Tenant and/or Tenant's customers is denied reasonable access to the Demised Premises for any reason (other than a reason arising from or caused by the acts or omissions of Tenant or Tenant's, agents, contractors or employees) and as a result thereof is unable to and does not conduct business in the Demised Premises (a "Non-Operating Day") for more than thirty (30) days in any Lease Year, then Tenant's obligation to pay base annual rent and additional rent shall abate for each Non-Operating Day thereafter in said Lease Year until such time as Tenant is able to access the Demised Premises or begins to conduct business in the Demised Premises, whichever shall first occur…

The defendant made sporadic payments towards rent and additional rent charged to it under the lease until April 2020, when it ceased making payments altogether. The plaintiff's general counsel, Avi Peison, asserts, and a tenant ledger reflects, that through July 2020, the sum of $246,654.02 in rent arrears was due to the plaintiff. The defendant surrendered possession on July 30, 2020.

III. DISCUSSION

A. Summary Judgment

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the

existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Importantly, "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

i. The plaintiff's claims

The plaintiff's submissions, which include, *inter alia*, the affidavit of its general counsel, the lease, and a tenant ledger applicable to the defendant's occupancy of the premises, establish, *prima facie*, the plaintiff's entitlement to relief on the first cause of action. Specifically, the plaintiff's proof demonstrates (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 claim of entitlement to $246,654.02 is supported by the record and represents the amount of rental arrears the defendant owes from the commencement of the lease through July 30, 2020, the date the defendant vacated the premises.

The defendant's argument that the plaintiff cannot recover the full amount of rental arrears owed pursuant to the lease because the plaintiff did not demand such payment during the

four years the arrears continued to accrue and orally represented that "the rent would not immediately be due and would ultimately be discounted" is unavailing.

It is well-settled that contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. See Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175 (1982). Such abandonment "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." General Motors Acceptance Corp. v Clifton–Fine Cent. School Dist., 85 NY2d 232, 236 (1995); see Hadden v Consolidated Edison Co. of N.Y., 45 NY2d 466 (1978). Nonetheless, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection. Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 (1988). Generally, the existence of intent to waive a contractual right is a question of fact. See Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y., 61 NY2d 442 (1984).

"The inclusion of a merger clause in an instrument is no bar to waiver because 'a contractual provision against oral modification may itself be waived.'" Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC, 30 AD3d 1, 6 (1st Dept. 2006) (quoting Rose v Spa Realty Assoc., 42 NY2d 338, 343 [1977]). However, a party invoking waiver in the presence of a merger or no-waiver clause is subject to a "heightened standard" to merit relief. Gans v Wilbee Corporation, 199 AD3d 564, 564 (1st Dept. 2021). To avoid contractual obligations in such circumstance, "some performance confirming the modification must be present, and it must be 'unequivocally referable to the oral modification.'" Paramount Leasehold, L.P. v 43rd Street Deli, Inc., 136 AD3d 563, 568 (1st Dept. 2016) (quoting Rose v Spa Realty Assoc., supra at 343). "[I]n the context of a lease dispute, there must be 'sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted

by subsequent actions.'" Paramount Leasehold, L.P. v 43rd Street Deli, Inc., supra at 568 (quoting Simon & Son Upholstery v 601 W. Assoc., 268 AD2d 359, 360 [1st Dept. 2000]).

Here, Article 60 of the lease contains a no-waiver clause providing that "[t]here are no oral or written agreements between Landlord and Tenant affecting this lease" and that "this lease may be amended only by instruments in writing executed by Landlord and Tenant." Similarly, Article 80 of the lease provides that the lease "contains the entire agreement between the parties" and that

> no agent, representative, salesman, or officer of either Landlord or Tenant hereto has authority to make or has made any statement, agreement or representation, either oral or written, in connection herewith, or modifying, adding or changing the terms and conditions herein set forth. No dealings between the parties or custom shall be permitted to contradict or modify any of the terms hereof. No modification or waiver of this lease or any of the terms hereof shall be valid or be binding unless such modification or waiver shall be in writing and signed by duly authorized officers of both of the parties hereto.

Moreover, Article 24 of the lease provides, in relevant part,

> No payment by Tenant or receipt by Owner of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement of any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Owner may accept such check or payment without prejudice to Owner's right to recover the balance of such rent or pursue any other remedy in this lease provided.

In sum, the parties explicitly agreed in the lease both that all modifications were to be in writing and that the plaintiff could accept lesser rent payments without prejudice to its right to recover the balance of all stipulated rent due from the defendant.

Considering a defendant tenant's waiver argument in the context of a similar no-waiver provision, the Court of Appeals held that the payment of prorated rent in lieu of the annual rent provided for in the parties' lease "was just as demonstrative of breach of contract as of

completion of the purported oral modification [of the payment terms]." Eujoy Realty Corp. v Van Wagner Communications, LLC, 981 NYS2d 326, 335 (2013). Accordingly, it could not be said that such partial payment was unequivocally referable to the oral modification. To be sure, the Court noted, General Obligations Law § 15-301, which codifies the enforceability of no-waiver clauses, "becomes meaningless if a tenant's nonpayment of the rent required by a lease is sufficient to prove an oral modification of payment terms, or estop the landlord from recovering the shortfall." Id. at 335.

The same reasoning compels the court to reject the defendant's waiver defense here. The defendant's partial payments were not unequivocally referable to the plaintiff's alleged waiver and the plaintiff's acceptance of the same was consistent with the provisions of the lease. The partial payments and acceptance, supported only by the defendant's uncorroborated representation that full payment was waived, are not sufficient to create a triable issue of fact in the face of the lease. See Paramount Leasehold, L.P. v 43rd Street Deli, Inc., supra at 569 (no issue of fact as to breach of lease obligation to pay percentage rent where only evidence of waiver was defendant's failure to pay percentage rent over the years); 457 Madison Ave. Corp. v Lederer De Paris, Inc., 51 AD3d 579, 579 (1st Dept. 2008) (in light of no-waiver clause, no waiver where landlord did not demand increased rent payments it was entitled to under lease for first five months of the year).

However, the defendant raises a triable issue with respect to the applicability of Article 101 of the lease to abate its rent obligations. Contrary to the plaintiff's assertions, the plain terms of Article 101 do not require that the defendant or its customers be categorically denied access to the premises in order for abatement to be triggered. Rather, Article 101 applies whenever "reasonable access" to the premises is denied for any reason "other than a reason

arising from or caused by the acts or omissions of" of the defendant. Here, the defendant claims that, beginning in March 2020, its nail salon and restaurant were forced to close or deny access to patrons as a consequence of executive orders limiting certain in-person business activities due to the risks posed by the COVID-19 virus. Accordingly, there is a question of fact as to whether the defendant should be required to pay the rent that accrued while the executive orders remained in effect.

Moreover, while the absence of the defendant's default is a prerequisite to abatement under Article 101, there is a question of fact as to whether the plaintiff waived its right to timely rent payments by consistently accepting late payments without protest since the lease's inception. See Madison Ave. Leashold, LLC v Madison Bentley Assoc. LLC, supra at 6 ("Any provision of a contract is subject to waiver, particularly a provision requiring timely payment."); Snide v Larrow, 93 AD2d 959, 959 (3rd Dept. 1983) ("knowledgeable acceptance of late payments over an extended period of time . . . establishes the necessary elements to constitute a waiver of the right to insist upon timely payments" [citation omitted]). The court notes that the question of whether the plaintiff chose to allow late payments without holding the defendant in default, so as to abandon its contractual right to timely payment, is distinguishable from any purported waiver of the plaintiff's contractual right to full payment, which the court has considered and rejected. See Echostar Satellite, L.L.C. v ESPN, Inc., 79 AD3d 614, 618 (1st Dept. 2010).

Further, where, as here, it appears that the facts essential to oppose a motion for summary judgment "exist but cannot then be stated" (CPLR 3212[f]), a court may deny the motion. See Schlichting v Elliquence Realty, LLC, 116 AD3d 689 (2nd Dept. 2014); Wesolowski v St. Francis Hospital, 108 AD3d 525 (2nd Dept. 2013). "This is especially so where the opposing

party has not had a reasonable opportunity for disclosure prior to the making of the motion." Wesolowski v St. Francis Hospital, supra at 526 [internal quotation marks omitted]; see Belziti v Langford, 105 AD3d 649 (1st Dept. 2013); Blech v West Park Presbyterian Church, 97 AD3d 443 (1st Dept. 2012). As of the filing of the instant motion, no discovery had been conducted. Moreover, while the court directed discovery to commence in an order dated September 10, 2021, the parties failed, without excuse, to comply with the court's, as memorialized in the court's preliminary conference order dated December 2, 2021. The parties are reminded that summary judgment motions do not stay discovery deadlines, that court-imposed discovery deadlines are to be strictly adhered to, and that failure to comply with such deadlines may result in sanctions, including striking of the pleadings.

In light of the foregoing, the plaintiff's motion for summary judgment on its first cause of action is denied. Summary judgment is likewise denied as to the plaintiff's second cause of action, which seeks contractual attorney's fees predicated on the plaintiff's successful prosecution of its claims.

ii. The defendant's counterclaim

The defendant's sole counterclaim, labeled a claim for "Setoff or Counterclaim," seeks damages arising from the plaintiff's alleged refusal to permit the defendant to remove certain fixtures from the premises when the defendant vacated. Article 73 of the lease provides that certain improvements installed at the premises at the defendant's expense become the property of the plaintiff at the termination of the lease. However, Article 73 expressly excepts furniture or movable trade fixtures installed by the defendant. The defendant states that when it attempted to remove its fixtures and equipment on July 20, 2020, the plaintiff would not allow it to use the elevator at the premises and ignored the defendant's attempts to request access to the elevator.

The defendant contends that it could not remove its property without the assistance of the elevator.

In its initial moving papers, the plaintiff does not dispute the facts alleged by the defendant. To the extent the plaintiff belatedly submits evidence that it did not obstruct the defendant from removing its property from the premises, such evidence may "not be considered in gauging whether [the plaintiff] made a *prima facie* showing of entitlement to judgment as a matter of law because it was submitted for the first time on reply." Starr Indemnity & Liability Company v U.S. Adjustment Corporation, 198 AD3d 551, 552 (1st Dept. 2021).

Moreover, the plaintiff's argument that the defendant cannot maintain its counterclaim because its obligation to pay rent was unconditional and "without any deduction or setoff whatsoever" is misplaced. While the defendant cannot claim that the alleged wrongful retention of its property is a defense to its payment obligations under the lease, nothing in the lease prevents the defendant from otherwise recovering under the breach of contract theory set forth in its pleading.

B. Dismissal of Affirmative Defenses

Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). In reviewing such a motion, "the allegations set forth in the answer must be viewed in the light most favorable to the defendant." Granite State Ins. Co. v Transatlantic Reinsurance Co., supra at 481; see 182 Fifth Avenue LLC v Design Development Concepts, Inc., 300 AD2d 198 (1st Dept. 2002).

The plaintiff demonstrates entitlement to dismissal of the first and second affirmative defenses, which invokes the doctrines of impossibility and frustration of purpose. Because the parties expressly considered and allocated the risk that the defendant could not perform under the lease due to, *inter alia*, governmental restrictions, which encompass the executive orders that prevented the defendant from operating its businesses, as well as the risk that "reasonable access" to the premises would be prevented, the defendant cannot argue that the event which prevented performance was unforeseeable. This defeats any resort to the doctrines of impossibility, (Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900 [1987]), or frustration of purpose, (Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34 [1st Dept. 2020]).

The fourth, fifth, sixth affirmative defenses, and the seventh affirmative defense, to the extent it invokes the doctrines of laches and estoppel, are devoid of any factual or legal support and likewise subject to dismissal. The seventh affirmative defense is also dismissed insofar as it invokes waiver, for the reasons the court has discussed.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment and to dismiss the defendant's affirmative defenses is granted to the extent that the first, second, fourth, fifth, sixth, and seventh affirmative defenses are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties are to comply in full with the preliminary conference order dated December 2, 2021, and shall appear on April 7, 2022, for a compliance conference via Microsoft Teams, as previously scheduled; and it is further

ORDERED that the parties' failure to comply with any of the court's existing or future discovery directives may result in sanctions pursuant to CPLR 3126, including, but not limited to, striking of the pleadings.

This constitutes the Decision and Order of the court.

DATED: February 10, 2022

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