

MTS NY Propco, L.P. v Circle Parking LLC
2022 NY Slip Op 30992(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 651378/2021
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

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INDEX NO. 651378/2021

MTS NY PROPCO, L.P., MTS NY LESSEE, L.P.,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 003 004

- v -

CIRCLE PARKING LLC, ICON PARKING
HOLDINGS, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 52-59, 62, 63, 65, 66 were read on this motion for _____ contempt _____.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68-94 were read on this motion to/for _____ summary judgment _____.

This action arises from defendants’ failure to pay monthly rent to plaintiffs since April 2020. By decision and order dated October 12, 2021, defendants’ motion to dismiss the second cause of action for breach of contract as against defendant Icon and the third cause of action for fraudulent conveyance was granted. (NYSCEF 60). The first cause of action for breach of contract as against defendant Circle Parking LLC d/b/a Icon Parking remains.

By proposed order to show cause, plaintiffs moved for an order finding Circle in civil and criminal contempt for its willful failure to pay them the aggregate use and occupancy sum of \$1,079,114.88 on or before August 31, 2021 as ordered on August 17, 2021. As plaintiffs failed to demonstrate their entitlement to monthly accountings or attorney fees in their supporting papers, Circle was ordered to show cause solely as to why it should not be held in contempt (NYSCEF 62). (Mot. seq. 3).

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment. (Mot. seq. 4). Circle opposes. The motions are consolidated for decision.

I. CONTEMPT (mot. seq. 3)

By decision and order, dated August 11, 2021, plaintiffs' motion for use and occupancy *pendente lite* was granted. A corresponding order was signed on August 17, 2021 (NYSCEF 45, 47), pursuant to which Circle is required to pay plaintiffs the use and occupancy amount on or before August 31, 2021, along with use and occupancy at the monthly rate of \$179,852.48 on the first day of each month, *pendente lite*, starting on September 1, 2021, through the determination of this action. It is undisputed that on August 31, 2021, Circle surrendered possession of the premises.

As the August 2021 order constitutes a money judgment (CPLR 105[q]) that is enforceable by execution (*Calvert v Le Tam Realty Corp.*, 118 AD2d 426, 427 [1st Dept 1986]), an order of contempt is not available.

II. SUMMARY JUDGMENT (mot. seq. 4)

As Circle does not dispute that on July 31, 1979, its predecessor-in-interest entered into the lease for the garage areas of the hotel at 790 Seventh Avenue in Manhattan and that it failed to pay plaintiffs \$2,041,754.94 and \$98,967.78, respectively, the total fixed rent and valet commission accruing since April 1, 2020 and continuing, totaling \$2,140,722.72, as set forth in plaintiffs' written default notices dated December 14, 2020, and January 28, 2021 (NYSCEF 70, 73, 74, 76), plaintiffs demonstrate, *prima facie*, their entitlement to summary judgment on their cause of action for breach of contract as against Circle.

Circle raises no issue of fact in opposition. That the pandemic had the effect of reducing Circle's revenues does not relieve it from paying rent, and it is not disputed that it remained open

to customers throughout its occupancy during the pandemic. In *Valentino USA, Inc. v 693 Fifth Owner LLC*, the Court affirmed the summary dismissal of a complaint finding inapplicable a claim based on frustration of purpose where the purpose of the contract is not “completely thwarted.” (AD3d , 160 NYS3d 858 [1st Dept 2022]). Nor were temporary governmental restrictions on in-person operations implicated, the Court held, observing that the parties’ respective duties were to pay rent in exchange for occupying leased premises, and the plaintiff had acknowledged being open for curbside retail services on relevant dates. The Court also rejected the claim based on impossibility as the pandemic did not render the plaintiff’s performance impossible, even if a “luxury experience” was rendered more difficult to provide. (*Id.*). Given this authority, Circle has no need to conduct discovery concerning the impact of the pandemic on its or the hotel’s business.

In light of plaintiffs’ representation that it is not charging Circle with use and occupancy beyond August 31, 2021, when Circle vacated the premises, Circle has no need for discovery concerning the new occupant of the premises. Nor does Circle need discovery as to the market value of the premises as the lease was negotiated by sophisticated businesspeople and Circle offers no reason to believe that the rent was unreasonable or against public policy in 1979, when the lease was executed. (Real Property Law § 235-c [if court as matter of law finds lease or lease clause “to have been unconscionable at the time it was made,” it may refuse to enforce it]).

Plaintiffs also demonstrate, *prima facie*, their right to summary dismissal of all 15 affirmative defenses. Circle opposes to the extent of again claiming entitlement to discovery as to the seventh, twelfth, and fifteenth affirmation defenses. As it offers no basis for finding that any evidence, absent the destruction of the premises, would entitle it to withhold rent, no discovery is warranted.

Accordingly, it is hereby
 ORDERED, that plaintiffs’ motion for contempt is denied (mot. seq. three); it is further
 ORDERED, that plaintiffs’ motion for summary judgment is granted in its entirety (mot.
 seq. four); and it is further
 ORDERED, that plaintiffs submit a proposed order and judgment in accordance with this
 decision and order within 30 days of the date of this order.


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3/28/2022
 DATE

 BARBARA JAFFE, 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