180 Varick LLC v House Showroom, Inc.
2022 NY Slip Op 31037(U)
March 29, 2022
Supreme Court, New York County
Docket Number: Index No. 651955/2021
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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180 VARICK LLC,

Plaintiff,

- v -

HOUSE SHOWROOM, INC., and ICO SPORTSWEAR LTD.,

Defendants.

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INDEX NO. 651955/2021

MOTION DATE 11/23/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

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

I. INTRODUCTION

The plaintiff landlord in this breach of contract action seeks, *inter alia*, to recover unpaid rent and additional rent due under a commercial lease agreement with the defendant tenant House Showroom, Inc. (House), and under a guaranty agreement with the defendant guarantor ICO Sportswear Ltd. (ICO). The plaintiff now moves (1) pursuant to CPLR 3212 for summary judgment on the complaint in the sum of $82,848.84 and for contractual attorney's fees, (2) to strike and dismiss the defendants' affirmative defenses and counterclaims and (3) to sever the remainder of its claims for rent and additional rent to the extent that such claims accrue after September 30, 2021, through the expiration date of the subject lease. The defendants oppose the motion. For the following reasons, the motion is granted in part.

II. DISCUSSION

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of its motion, the plaintiff submits, *inter alia*, the verified complaint; the affidavit of Steven Marvin, the executive managing director of the plaintiff's registered managing agent; the subject commercial lease agreement (the lease) signed by House; a personal guaranty agreement referable to House's obligations under the lease (the guaranty) signed by ICO; a rent ledger referable to House's payments under the lease; and electrical bills and real estate taxes supporting the plaintiff's calculation of additional rent.

The plaintiff's submissions demonstrate that the plaintiff and House entered into a five-year lease with respect to Suite 810 of the premises located at 180 Varick Street in Manhattan on or about July 24, 2018, for a term that commenced on August 1, 2018, and is set to expire on July 31, 2023. On July 19, 2018, ICO executed the guaranty, guaranteeing to the plaintiff the performance of all of House's obligations under the lease, including, without limitation, House's obligations to pay rent, additional rent, and reasonable attorney's fees. Beginning in May 2020,

House began making only partial payments towards its rent and additional rent. Through September 29, 2021, House owes the plaintiff arrears in the sum of $82,848.84. House remains in possession of the subject premises.

The plaintiff's proof establishes, *prima facie*, its entitlement to summary judgment in the sum of $82,848.84 on its claims sounding in breach of contract. Specifically, the plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' 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). Moreover, "where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The terms of the subject guaranty, executed by ICO's president on ICO's behalf, are clear, unambiguous, absolute, and unconditional. The defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the guaranty. The ledger and supporting documentation submitted by the plaintiff establishes that as of September 29, 2021, the plaintiff was owed a balance of $82,848.84 in unpaid rent and additional rent from House.

In opposition, the defendants submit, *inter alia*, the affirmation of Robert Knuth, the defendants' president, and various photographs and audio recordings purporting to show construction work being done to the façade of the subject premises. Contrary to the plaintiff's assertions, Knuth's affirmation is in conformity with the requirements of CPLR 2106(b) and the court may properly take notice of it. Knuth avers that, as stated in the defendants' unverified counterclaims, the plaintiff failed to fulfill its own obligations under the lease because it turned off heat to the premises at 4:00 p.m. instead of 6:00 p.m., failed to provide access to a passenger elevator on the weekends, and failed to provide hot water in the bathrooms. Knuth further contends that for the past three years, the plaintiff has performed extensive construction work at the premises, such that the façade of the premises has been covered in scaffolding and construction noise and dust have entered the premises, making it impossible to use. Finally, Knuth states that the COVID-19 pandemic and attendant restrictions made it impossible to "fully" use the premises after March 2020.

According to the defendants, each of the foregoing frustrated the purpose of the lease and rendered House's payment of rent impossible, such that House's payment obligations under the lease should be excused in their entirety. The court will address each argument in turn.

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). "Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed ... and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it." Id. at 42-43.

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).

Under the facts presented, the defendants fail to demonstrate that the purpose of the lease was frustrated. First, Article 4 of the lease expressly provides, in relevant part, that the tenant is not entitled to any setoff reduction of rent by any reason of the landlord's failure to comply with any of the covenants of the lease, subject to certain exceptions not present here. Similarly, Article 20 provides that there shall be no liability on the part of the landlord by reason of "inconvenience, annoyance or injury to business" arising from the performance of repair work on the building. Thus, the parties expressly allocated to House the risk that the landlord would engage in potentially disruptive building repairs or fail to provide amenities as specified in the lease.

Second, the defendants have not presented any persuasive evidence that the plaintiff's failure to provide heat for the last two hours of the work day, make available a passenger elevator on the weekend, and provide hot water to bathrooms, or its repairs to the subject premises "so completely" frustrated the purpose of the lease that, had such events been foreseen, the "transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, supra at 42. Indeed, while the defendants make conclusory allegations that the foregoing made it "impossible" for them to use the premises, apparently for a number of years, it is undisputed that they nonetheless have continued to do so rather than vacating. Likewise, while the defendants aver that their business was temporarily subjected to "in-person workplace restrictions" due to the COVID-19 pandemic, mere restrictions on capacity or the diminished profitability of the defendants' business model do not amount to a complete frustration of the purpose of the lease. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra.

Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he 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."). Put differently, impossibility may excuse performance of a contract if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable. RW Holdings, LLC v Mayer, 131 AD3d 1228 (2nd Dept. 2015) (quoting Pleasant Hill Dev., Inc. v Foxwood Enters., LLC, 65 AD3d 1203 [2nd Dept. 2009]).

The impossibility defense to contract performance should be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018) (failure to pay rent as agreed and ensuing eviction proceeding did not excuse performance under contract of sale); Urban Archeology Ltd. v 2017 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009) (economic downturn did not excuse tenant's performance under lease).

Here, the defendants' impossibility defense fails because the text of the lease, as discussed above, demonstrates that the conditions the defendants claim rendered their performance impossible were foreseeable. Moreover, the defendant does not, and cannot, claim that the means of its performance under the lease were completely destroyed either by the plaintiff's actions or the pandemic and attendant shutdown orders.

In light of the foregoing, the defendants raise no issue of fact as to the availability of the frustration of purpose or impossibility doctrines to excuse their obligations under the lease. Accordingly, the plaintiff is entitled to summary judgment in the sum of $82,848.84. The plaintiff is also entitled to contractual attorney's fees under Paragraph 19 of the lease. See generally Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). The plaintiff's application for attorney's fees is granted to the extent that the plaintiff may submit an attorney's affirmation,

billing records or invoices, and any other supporting proof within 60 days of the date of this order and shall notify the Part 42 Clerk of any such filing.

As to the branch of the plaintiff's motion seeking summary judgment dismissing the defendants' counterclaims, the proof discussed above demonstrates the plaintiff's entitlement to dismissal of the third, fourth, and fifth counterclaims to the extent each seeks relief based on impossibility of performance and frustration of purpose arising from the COVID-19 pandemic. In addition, those counterclaims are subject to dismissal insofar as they improperly invoke the casualty clause in Article 9 of the lease in the context of the pandemic. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra at 577 (citing cases); see also Gap Inc. v Ponte Gadea New York LLC, 2021 WL 861121, *6 (S.D.N.Y. March 8, 2021). The parties' submissions likewise demonstrate that the defendants' first and sixth counterclaims lack merit and must be dismissed, for the reasons discussed in the plaintiff's moving papers.

However, the defendants' submissions raise a triable issue of fact with respect to their second counterclaim, which alleges breach of contract based on the plaintiff's purported failure to provide certain amenities as specified in the lease. Thus, notwithstanding that such breach does not excuse House's performance of its payment obligations, the second counterclaim may proceed. See Carlyle, LLC v Beekman Garage LLC, 133 AD3d 510 (1st Dept. 2015).

The branch of the plaintiff's motion seeking to strike the defendants' affirmative defenses is granted. 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). For the reasons discussed in the plaintiff's moving papers, the plaintiff meets this burden with respect to all affirmative defenses.

Finally, the branch of the plaintiff's motion seeking to sever and continue so much of its second and fifth causes of action as seek unpaid rent accruing after September 30, 2021, through the termination of the lease, is denied. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease.") The lease at issue here contains no such clause. The plaintiff cannot maintain an action on the remainder of its claims insofar as it only seeks future rents. Therefore, the remainder of the second and fifth causes of action are dismissed without prejudice to assert new claims for rent due under the lease once those claims accrue, i.e., become due, in a new action.

Accordingly, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint and for related relief is granted to the extent that (1) the plaintiff is awarded judgment on the first, second, fourth, and fifth causes of action in the sum of $82,848.84, (2) the plaintiff is awarded summary judgment on the issue of liability on the third and sixth causes of action seeking attorney's fees; (3) each of the defendants' affirmative defenses and the defendants' first, third, fourth, fifth, and sixth counterclaims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of $82,848.84, with statutory interest from September 30, 2021; and it is further

ORDERED that, if so advised, the plaintiff may submit as supplemental papers an attorney's affirmation, billing records or invoices, and any other supporting proof as to damages on the third and sixth causes of action within 60 days of the date of this order and shall notify the Part 42 Clerk (SFC-Part42-Clerk@nycourts.gov) of any such filing; and it is further

ORDERED that the remainder of the plaintiff's second and fifth causes of action, seeking future rent and additional rent that may become due under the subject lease after September 30, 2021, are dismissed without prejudice to the plaintiff's bringing such claims, as well as any claim for attorneys' fees arising from such claims, in a new action once such claims accrue; and it is further

ORDERED that the defendants' second counterclaim is severed and shall continue; and it is further

ORDERED that the parties shall commence discovery and appear for a preliminary conference on May 26, 2022, at 12PM.

This constitutes the Decision and Order of the court.

DATED: March 29, 2022

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