

450 7th Ave. Assoc. LLC v T. S. Anand & Co. CPA's, P.C.
2022 NY Slip Op 31072(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 651489/2021
Judge: Arthur Engoron
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On March 4, 2021, plaintiff sued defendants, alleging six causes of action: (1) breach of contract as against The Company; (2) continuing damages as against The Company; (3) attorney's fees as against The Company; (4) breach of contract as against The Guarantors; (5) continuing damages as against The Guarantors; and (6) attorney's fees as against The Guarantors. NYSCEF Doc. No. 45.

On April 28, 2021, Ms. Lee filed a motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the fourth, fifth and sixth causes of action, as she had left The Company, had not signed a second guaranty, and thought various coronavirus-related statutes made the guaranty unenforceable. NYSCEF Doc. No. 15. In a Decision and Order dated September 14, 2021, this Court denied Ms. Lee's motion. NYSCEF Doc. No. 38.

On April 30, 2021, The Company and Mr. Anand answered with twelve affirmative defenses: (1) financial hardship due to Covid-19; (2) casualty; (3) frustration of purpose and/or impossibility; (4) force majeure; (5) dangerous conditions due to lack of adequate ventilation; (6) an alleged toll of eviction and rent due to New York State and City orders; (7) harassment; (8) limitation on guarantor liability pursuant to New York City Administrative Code § 22-1005; (9) failure to state a cause of action upon which relief may be granted; (10) impossibility due to unforeseen government action; (11) temporary commercial impracticability; and (12) that the government's COVID-19-response constituted a casualty suspending rent obligations.

On August 5, 2021, The Company surrendered The Premises to plaintiff. NYSCEF Doc. No. 54.

In a stipulation dated October 19, 2021, plaintiff agreed to settle its claims against Ms. Lee in exchange for \$60,000, half of which was to be paid by November 1, 2021, and the remaining half of which was to be paid in monthly installments of \$2,500 starting December 1, 2021. NYSCEF Doc. No. 41.

On December 14, 2021, plaintiff moved, pursuant to CPLR 3212, for summary judgment against The Company in the amount of \$127,852.69 in fixed monthly base rent and additional rent from March 2020 through August 2021 and \$20,892.75 in attorney's fees, and against Mr. Anand in the same amounts. Plaintiff also moved, pursuant to CPLR 3211(a) and (b) and CPLR 3212, to dismiss defendant's affirmative defenses. NYSCEF Doc. No. 42.

Also on December 14, 2021, pursuant to 22 NYCRR 202.8g(a), plaintiff filed a Statement of Material Facts as to which it contends there is no genuine issue to be tried. NYSCEF Doc. No. 54.

In reply, defendants argue that: their affirmative defenses raise substantive arguments and reasonable COVID-19-related excuses; the stipulated settlement entered into by Lee must be taken into account in determining any damages; and that the instant motion is premature without discovery or depositions. NYSCEF Doc. Nos. 57 and 58.

Defendants neither replied to, nor filed their own, Statement of Material Facts.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”). The moving party’s burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

1. Breach of Lease and Breach of Guaranty

The elements of a cause of action for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep’t 2010).

Here plaintiff has made prima facie showings of breach of contract as to both The Lease and The Guarantees by providing: The Lease; The Guarantees; an affidavit of Steven J. Kaufman, Managing Member of plaintiff and the managing agent of the building in which The Premises are located, providing personal knowledge in support of the pleadings and the manner in which plaintiff’s records and rent ledgers are maintained; the rent ledger; and the relevant Business Improvement District and real estate tax invoices (NYSCEF Doc. No. 50).

It is undisputed that The Company leased The Premises from plaintiff, that The Company took possession of The Premises, that The Company stopped paying rent on The Premises after March 5, 2020, and that The Company’s default has damaged plaintiff. The Company’s belief that it was excused from paying rent is, for the reasons explained hereinbelow, incorrect.

It is also undisputed that The Guarantors signed The Guarantees obligating them to be personally liable were The Company to default on The Lease, that The Company defaulted on The Lease, that Anand has not satisfied his contractual obligation (while Lee has stipulated out), all of which has damaged plaintiff. For the reasons previously explained by this Court in its Decision and Order dated September 14, 2021, the fact that Ms. Lee was not a party to The 2016 Agreement did not release her from liability. Mr. Anand’s belief that The Guarantees are now unenforceable is, for the reasons explained hereinbelow, incorrect.

Additionally, Article 19 of The Lease and Section 9 of The Guaranty are clear that The Company and The Guarantors, respectively, are liable to plaintiff as the prevailing party for reasonable attorney’s fees.

Thus, plaintiff is entitled to a summary judgment against The Company on its first, second and third causes of action and against The Guarantors on its fourth, fifth, and sixth causes of action.

2. COVID-19 Affirmative Defenses

In March of 2020 the Governor of New York issued a number of Executive Orders, including Executive Order 202.6, requiring, inter alia, all non-essential businesses to reduce their in-person workforce by 50% starting March 20; and Executive Order 202.8, requiring, inter alia, all non-essential businesses to reduce their in-person workforce by 100% starting March 22. Those mandates remained in effect until June 22, 2020, when New York City entered “Phase II” of its reopening, allowing for the return of, inter alia, offices.

On May 13, 2020, the New York City Council amended the Administrative Code of the City of New York to add § 22-1005, titled “Personal liability provisions in commercial leases,” which, as later amended and as relevant here, made personal guarantees on certain leases unenforceable if the tenant satisfied one of three conditions, discussed below, and the instant default occurred between March 7, 2020, and June 30, 2021 (“Guaranty Law”).

In its affirmative defense, The Company argues that its nonpayment should be excused due to the devastation of the ongoing global COVID-19 pandemic, and cites various executive orders signed by the then-Governor of New York, Andrew M. Cuomo, claiming that they show that the purpose of The Lease was variously frustrated and made impossible.

However, The Company only cites pre-pandemic caselaw, and in the time since those cases were decided the First Department has made it clear, in a line of COVID-19 commercial lease cases, that “the doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not completely deprived of the benefit of its bargain.” Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dep’t 2021) (internal quotations removed). “[F]rustration of purpose ... is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence.” Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 43 (1st Dep’t 2020).

Tenant explicitly contracted out of any government-based frustration or impossibility of purpose claims in The Lease, which states in Article 27: “the obligation of Tenant to pay rent hereunder ... shall in no way be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease ... if Owner is prevented or delayed from so doing by reasons ... including, but not limited to, government preemption or restrictions.”

Further, while the shutdown may have prevented the Company from occupying The Premises for three months out of a five-year lease, losing 5% of The Lease’s term is not the same as having its performance rendered impossible. See generally 558 Seventh Ave. Corp., v Times Sq. Photo Inc., 194 AD3d 561 (1st Dep’t 2021) (performance not rendered impossible where tenant reopened for curbside service).

Defendants’ argument that the Guaranty Law makes The Guarantees unenforceable, meanwhile, is a misreading of the statute. As this Court previously explained in its Decision and Order dated September 14, 2021, the Guaranty Law only applies when a tenant satisfies one of three conditions: (1) it was required to stop serving food or beverages on-site due to Executive Order 202.3; (2) it was a non-essential retail establishment limited by Executive Order 202.6; or (3) it was required to close to members of the public due to Executive Order 202.7 (requiring, inter alia, employers reduce their in-person workforce by 75%).

Here, The Lease is clear that The Company was to use The Premises only for the purposes of an executive office, a use that does not satisfy any of the Guaranty Law criteria (despite defendant's incongruous affirmation that it, an accounting firm, "was unable to sell beer, cigarettes and lotto."). And, again, as this Court previously noted, to read 202.7 as mandating the complete closure of The Company, a solo professional practice, "would be nonsensical."

As for defendants' remaining affirmative defenses, defendants have failed to support them with facts, and this Court finds them unavailing for that and other reasons.

3. Stipulation Setback

While, for the reasons stated hereinabove, this Court should grant plaintiff's motion as to liability, determining damages is more difficult.

Plaintiff seeks \$127,852.69 in unpaid rents (\$.56 fixed rent balance from March 2020 + \$7,010.56 in fixed rent for the months of April, May, June, July, August, September, and October 2020 + \$7,185.75 in fixed rent for the months of November and December 2020 and January, February, March, April, May, June, July, and August 2021 + real estate tax escalations of \$5,949.76 + additional rent consisting of business improvement district tax escalations of \$606.49 + an unexplained \$364.46) and \$20,892.75 in attorney's fees, as described in e-filed timesheets (NYSCEF Doc. No. 53).

However, because of the stipulation between plaintiff and Ms. Lee, in which the latter settled with plaintiff in exchange for a promised \$60,000, an amount that is not reflected in plaintiff's motion, the exact amount of damages outstanding is unclear.

Conclusion

Thus, it hereby ordered that the motion of plaintiff, 450 7th Ave. Associates LLC, for summary judgment is granted, on liability only, and the affirmative defenses of defendants, T. S. Anand & Company CPA's, P.C. and Tejinder Anand, are dismissed. Plaintiff may obtain a trial on damages only by presenting the Clerk with a Note of Issue, a copy of this Decision and Order, and the payment of any necessary fees. Plaintiff must file such Note of Issue within 30 days from the date of this Decision and Order, and plaintiff's failure to do so timely shall result in automatic disposal of this action. Plaintiff is further directed, within 30 days of filing the Note of Issue, to contact chambers to schedule the trial date.

3/31/2022

DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE