

Rumble Fitness LLC v 700 Broadway 1891 LLC

2022 NY Slip Op 31383(U)

April 25, 2022

Supreme Court, New York County

Docket Number: Index No. 654496/2021

Judge: Laurence Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

RUMBLE FITNESS LLC,

Plaintiff,

- v -

700 BROADWAY 1891 LLC, THE BOARD OF MANAGERS
OF THE SCHERMERHORN BUILDING CONDOMINIUM

Defendants.

-----X

INDEX NO. 654496/2021

MOTION DATE 08/20/2021,
02/23/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, 35, 36, 38

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

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

Upon the foregoing documents, it is

The following reads on an I) Order to Show Cause to i) enjoin and restrain Defendants from terminating a certain commercial lease, dated September 30, 2016, at the address of 700 Broadway, Ground Floor and Lower Level, New York, New York, predicated on a Default Notice dated July 9, 2021; to ii) enjoin and restrain defendants from commencing a summary proceeding; and iii) staying and tolling the expiration of the cure period set forth in the Default Notice; and II) Defendants’ i) motion to dismiss the affirmative defenses and causes of action asserted by plaintiff; ii) to grant summary judgment on defendants’ first counterclaim, awarding a money judgment against plaintiff in the amount of \$925,572.26 representing the unpaid rent, late charges, and interest due and owing subject to the lease period from March 1, 2020 through December 31, 2021; iii) to grant summary judgment on defendants’ second counterclaim for

attorneys' fees; and iii) vacate any injunction or temporary restraining order and direct Atlantic Specialty Insurance Company to pay or release the \$804,921.64 undertaking posted by Rumble Fitness per the Court's Order dated August 23, 2021 (see NYSCEF Doc. No. 27).

A Summons and Complaint were submitted on July 21, 2021 with causes of action for i) a declaratory judgment that "plaintiff is relieved of its obligation to remit payment under the lease for rent, additional rent, and other charges from March 16, 2020 to May 15, 2021."

An Order to Show Cause was submitted on July 23, 2021 and a Virtual Microsoft Teams Appearance was held on August 20, 2021. An August 23, 2021 Interim Order ordered "that the Temporary Restraining Order issued in this Court's July 22, 2021 Order remain in place pending a final decision on the instant motion, ... that plaintiff shall pay to defendant Use and Occupancy for the Premises in the amount of \$49,241.01 for August and thereafter in the amount of \$49,241.01 on or before the first of every month, ... that plaintiff shall post an undertaking as required by CPLR 6312(b) in the sum of \$804,921.64 (the amount of the rent arrears prior to the filing of the instant action)" (see NYSCEF Doc. No. 27).

Plaintiff has filed a Notice of Appeal to the Appellate Division of the Supreme Court, First Judicial Department with regards to the August 23, 2021 Interim Order (see NYSCEF Doc. No. 38).

Issued was joined with defendants' answer with counterclaims on September 20, 2021 (see NYSCEF Doc. No. 33). An undertaking has been submitted for the sum of \$804,921.64 (see NYSCEF Doc. No. 32).

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The

proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.” *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

Defendants submit corporate documents (see NYSCEF Doc. No. 63, 65), the deed (see NYSCEF Doc. No. 64), the lease agreement (see NYSCEF Doc. No. 66), an account statement (see NYSCEF Doc. No. 72), and interest accrued (see NYSCEF Doc. No. 73).

“Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact.” *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

The affidavit from Andrew Stenzler, co – founder of Rumble Fitness LLC affirms, “[o]n March 7, 2020, Governor Cuomo issued Executive Order No. 202, declaring a disaster emergency for the entire State of New York due to COVID-19. On March 15, 2020, Governor Cuomo issued Executive Order 202.3, which stated that any ‘gym, fitness centers or classes ... shall [] cease operation effective at 8 pm on March 16, 2020 until further notice.’ On July 6, 2020, Governor Cuomo issued Executive Order 202.48, reiterating that gyms and fitness centers were to remain closed, in their entirety, indefinitely. The Lease does not address the impact of a global pandemic on the parties’ obligations. The COVID-19 pandemic is an event that, when negotiating the Lease, the parties reasonably did not foresee as a real possibility that could affect performance under the Lease” (see NYSCEF Doc. No. 83 Par. 10, 11, 14, 31).

Plaintiff’s memorandum of law states, “[p]laintiff (sic) fails to explain how the present circumstance – a global pandemic – was foreseeable to the parties when crafting the Lease, because it cannot” (see NYSCEF Doc. No. 82 P. 4). That is a correct statement and the affidavit

of Andrew Stenzler affirms, “[t]he Lease does not address the impact of a global pandemic to the parties’ obligations.”

Plaintiff highlights frustration of purpose in relation to commercial contracts. “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” (see *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 AD3d 506, 506 [1st Dept 2011]).

Defendants’ Memorandum of Law in Reply highlights § 21.8 of the Lease, “Unavoidable Events.”

This Lease and the obligations of Tenant to pay the Rent and perform Tenant’s other obligations under this Lease shall not be waived, delayed or otherwise affected in any manner. Neither Landlord nor Tenant shall have any liability, if Landlord or Tenant is unable to comply with, or is delayed in complying with, any of Landlord’s or Tenant’s obligations under this Lease, other than the payment of monies due under this Lease, by reason of any [Unavoidable Events].”

Defendants’ Memorandum of Law highlights the First Department’s decisions in *The Gap* and *Times Sq.* “The doctrine of frustration of purpose does not apply as a matter of law, as here, the tenant was not completely deprived of the benefit of its bargain” (see *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 576-77 [1st Dept 2021]). “Although the fore majeure clause in the lease would excuse the parties from their obligations under the lease for the duration of certain circumstances beyond their control, the clause expressly excepts the tenant’s obligation to pay rent and additional rent” (see *558 Seventh Ave. Corp. v. Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021]).

Here the Court is certainly not oblivious to the unprecedented circumstances created by COVID and the impact it has had on everyone personally and professionally. In the commercial realm both landlords and tenants have endured financial hardships but in the specific

circumstances herein this is a long term lease and the COVID situation and related Governmental orders were for a fixed time period since concluded.

“To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented.” *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 (1968).

Through all the papers submitted it is now

ORDERED that Defendants are i) enjoined and restrained from terminating a certain commercial lease, dated September 30, 2016, at the address of 700 Broadway, Ground Floor and Lower Level, New York, New York; and it is further

ORDERED that Plaintiff’s application to ii) enjoin and restrain Defendants from commencing a summary proceeding is DENIED; and it is further

ORDERED that Plaintiff’s application iii) staying and tolling the expiration of the cure period set forth in the Default Notice is DENIED; and it is further

ORDERED that Defendants’ motion i) to dismiss the affirmative defenses and causes of action asserted by plaintiff is GRANTED; and it is further

ORDERED that Defendants’ motion ii) to grant summary judgment on defendants’ first counterclaim, awarding a money judgment against plaintiff in the amount of \$925,572.26 representing the unpaid rent, late charges, and interest due and owing subject to the lease period from March 1, 2020 through December 31, 2021 is GRANTED; and it is further


ORDERED that Defendants’ motion iii) to grant summary judgment on defendants’ second counterclaim for attorneys’ fees is GRANTED; and it is further

ORDERED that Atlantic Specialty Insurance Company is to pay or release the \$804,921.64 undertaking posted by Rumble Fitness per the Court’s Order dated August 23, 2021 to Defendants;’ and it is further

ORDERED that an assessment of attorney’s fees against plaintiff Rumble Fitness, LLC is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

<p><u>4/25/2022</u> DATE</p>		<p> LAURENCE LOVE, J.S.C.</p>								
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