

Gallagher's Stud, Inc. v Gallagher's Famous, LLC

2022 NY Slip Op 32378(U)

July 18, 2022

Supreme Court, New York County

Docket Number: Index No. 653390/2021

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

Justice

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GALLAGHER'S STUD, INC., CONSTANCE MARTINSON,
BARBARA MIRSKY, ANDREW LISS, HEIDI LISS, JULIET
LISS, ANTHONY YOKEN, DAVID YOKEN, HOLLY YOKEN,
BETHENY STEIER, and ELIZABETH SPERBER,

Plaintiffs,

- v -

GALLAGHER'S FAMOUS, LLC, and DEAN POLL,

Defendants.

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INDEX NO. 653390/2021

MOTION DATE 10/01/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 49

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Plaintiff Gallagher's Stud, Inc., owning a 50 percent interest in real property located at 228 West 52nd Street in Manhattan, and the remaining plaintiffs, owning in the aggregate the remaining 50 percent interest, commenced this action against defendant Gallagher's Famous, LLC, as commercial tenant (the "Tenant"), and against defendant Dean Poll, as guarantor, seeking a judgment for rent arrears in a principal sum of \$907,064.60 as of the time of commencement in May 2021. Plaintiffs now move for summary judgment against Tenant, which is opposed.

Pursuant to a lease dated February 1, 2013, plaintiffs leased the premises to Tenant for use as a restaurant (NYSCEF Doc. No. 2 [Lease]). Plaintiffs submit the affidavit of Marlene Brody, the principal of plaintiff Gallagher's Stud, Inc. (NYSCEF Doc. No. 21), which identifies the Lease, and sets forth detailed facts regarding the amounts due under the Lease, including

base rent, the default rate of interest, and the amount of real estate taxes owed by Tenant under the Lease. Based on the detailed treatment set forth in Ms. Brody's affidavit, the total amount due in arrears aggregates \$1,200,331.85 as of the date of the filing of plaintiffs' motion for summary judgment on October 1, 2021 (*see*, NYSCEF Doc. No. 21 ¶ 29).

Tenant does not dispute any of the foregoing. Rather, it complains that economic difficulties arising from the COVID-19 shutdowns gave rise to frustration of performance (*see*, Opp. Mem. [NYSCEF Doc. No. 36] at 6-12).

However, the defense of frustration of purpose applies only where the tenant was "completely deprived of the benefit of its bargain" (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021]; *see also*, *City Natl. Bank v Baby Blue Distributions, Inc.*, 199 AD3d 559 [1st Dept 2021]). In other words, frustration of purpose applies "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 [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" (*Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020] [internal quotation marks and citations omitted]). "[T]his doctrine is a narrow one which does not apply "unless the frustration is substantial" (*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]).

Tenant has also pointed to a force majeure clause found in the Lease which identifies "government restrictions" as a factor. Where a lease includes a force majeure or Acts of God clause, it "is to be narrowly construed and only if the force majeure clause specifically includes

the event that actually prevents a party's performance will that party be excused” (*Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 434 [1st Dept 2009], quoting *Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]). “Such force majeure clauses excuse non-performance only where the reasonable expectations of the parties have been frustrated due to circumstances beyond the control of the parties” (*Macalloy Corp. v Metallurg, Inc.*, 284 AD2d 227, 227 [1st Dept 2001]).

Here, these defenses do not apply. The Lease provides that either party may have additional time to perform its obligations under the lease in the event of “strikes, lockouts, or other labor disputes, inability to obtain labor or materials, acts of God, governmental restrictions, “or other causes of a like nature” (NYSCEF Doc. No. 2 § 22b). However, that provision is an insert to section 26 of the Lease, titled “Inability to Perform,” which expressly states that “[t]his lease and the obligations of Tenant to pay rent hereunder . . . shall in no wise be affected, impaired or excused . . . 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 . . . by war or other emergency” Thus, the parties expressly foresaw that this situation might occur and guarded against it (*Kel Kim Corp.*, 70 NY2d at 902). To wit, through the additional time accommodation found in section 22b, made a part of section 26. Excuse from payment altogether is not an option under the Lease.

Moreover, Tenant’s inability to use the premises for the exact purpose it operated it for before the onset of the COVID-19 pandemic constitutes neither frustration of purpose nor impossibility of performance. As the Appellate Division, First Department, has now declared more than once, a loss of revenues occasioned by the pandemic, or by executive orders issued to

guard against its spread, do not fulfill either doctrine (*e.g. City Natl. Bank v Baby Blue Distributions, Inc.*, 199 AD3d 559 [1st Dept 2021] [“However, the pandemic did not destroy the subject matter of the contract, i.e., defendants’ loan from plaintiff. Defendants still possessed or made use of the loaned funds. Nor did the pandemic destroy the means of performance”] [internal quotation marks and citations omitted]; *558 Seventh Ave. Corp.*, 194 AD3d at 562 [“Thus, although the pandemic has been disruptive for many businesses, the purpose of the lease in this case was not frustrated, and defendants’ performance was not rendered impossible, by its reduced revenues”]).

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). The court finds that plaintiffs have satisfied their burden on this motion. As discussed, Tenant’s opposition based on a defense of frustration of purpose, or contractual force majeure exception, does not suffice to defeat plaintiffs’ uncontradicted showing of indebtedness.

Tenant points out that plaintiffs’ motion was not accompanied by a Statement of Undisputed Facts. However, such inadvertence is remedied by the detailed fact affidavit of Marlene Brody. Tenant has not disputed the substance of those facts; but rather, has hinged its opposition on the legal argument of frustration of purpose, disposed of hereinabove.

The Lease, section 19, provides for an award of reasonable attorneys' fees incurred in the successful prosecution of a lawsuit such as this. The quantum of such fees will be severed for determination by a Special Referee.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted, and, accordingly; it is

ORDERED that plaintiffs, jointly, shall have judgment against defendant Gallagher's Famous, LLC, in the principal sum of \$1,200,331.85, plus interest accrued thereon at the statutory rate from October 1, 2021, and continuing to accrue to the date of satisfaction of judgment, and that the Clerk enter such judgment, and that plaintiffs have execution therefor; and it is further

ORDERED that plaintiffs, jointly, are entitled to their reasonable attorneys' fees incurred in this action in an amount to be heard and determined by a Judicial Hearing Officer ("JHO") or Special Referee at inquest; and, therefore, it is

ORDERED that the issue of such fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of plaintiffs' said fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the

“References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This constitutes the decision and order of the court.

ENTER:



<u>7/18/2022</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<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