

Tompkins Sq. Partners, LLC v 55 Secret St., LLC

2022 NY Slip Op 32655(U)

August 4, 2022

Supreme Court, New York County

Docket Number: Index No. 157389/2020

Judge: Suzanne Adams

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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. SUZANNE ADAMS PART 39TR

Justice

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TOMPKINS SQUARE PARTNERS, LLC,

Plaintiff,

- v -

55 SECRET STREET, LLC, DOUGLAS QUINT

Defendant.

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INDEX NO. 157389/2020

MOTION DATE 07/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff is the owner and landlord of the premises at 125 East 7th Street in Manhattan. By lease agreement dated April 19, 2011, plaintiff leased the eastern ground floor store in the premises to non-party Big Gay Inc. for the period April 29, 2011, through April 30, 2016. The lease period was extended through April 30, 2021, pursuant to a lease extension dated as of May 4, 2016, and the lease was assigned by Big Gay Inc. to defendant 55 Secret Street LLC ("Tenant") as of June 1, 2016. Defendant Douglas Quint guaranteed the lease and extension pursuant to a guaranty agreement made as of April 29, 2011. Plaintiff brought the instant action in September 2020 and now moves pursuant to CPLR 3025(c) to amend its complaint, pursuant to CPLR 3212 for summary judgment on its complaint, and pursuant to CPLR 3211(b) for dismissal of defendants' counterclaims. Defendants oppose the motion.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it, and summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521-22 (1st Dep’t 1989).

Here, viewing the evidence in a light most favorable to the non-moving party, plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law. Plaintiff has proffered proof, including the affidavit of its managing member, Eric Margules, and numerous exhibits, of the fixed and additional rent, late charges, and fees, that is owed by Tenant. In opposing plaintiff’s motion, defendants do not raise any factual questions that would preclude summary judgment. The opposing affidavit of Tenant’s manager, Jon Chapski, is noticeably devoid of proof that would substantiate assertions made in defendants’ opposing Memorandum of Law regarding the rent and other monies due plaintiff.

Defendants further rely on the doctrines of impossibility of performance and frustration of purpose, resulting from the shutdowns ordered in response to the global pandemic. The doctrine of impossibility or impracticability generally applies where performance is prevented by “the destruction of the means of performance by an act of God, *vis major*, or by law [citations omitted].” *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). “. . . [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 [citations omitted].” *407 E. 61st Garage, Inc.*, 23 N.Y.2d at 281. Further, “the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract [citations omitted].” *Kel Kim Corp. v. Central Markets, Inc.*, 70

N.Y.2d 900, 902 (1987). The frustration of purpose doctrine applies where the frustrated purpose was “so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.” *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep’t 2004). *See also, PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dept 2011) (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”). Neither doctrine is applicable here. The lease at issue specifically allocates the financial risk of any government-mandated shutdowns to Tenant. *See Margules Aff., Exhibit 1, Articles 27, 54*. Moreover, the First Department, in the context of the pandemic, has rejected the defenses of impossibility and frustration of purpose where a tenant was able to reopen for curbside service and gain access to the premises. *558 Seventh Ave. Corp. v. Times Sq. Photo Inc.*, 194 A.D.3d 561, 561-62 (1st Dep’t 2021). This holding is relevant in the instant circumstances, where Tenant operated an establishment serving ice cream and other limited food items. As noted in *45-47-49 Eighth Ave. LLC v. Conti*, 72 Misc. 3d 1210(A), the restrictions occasioned by the pandemic may have disrupted Tenant’s business, but “the subject matter of the contract – the restaurant premises – remained intact and usable. That the executive order required tenant to rearrange its operations to take-out-an-delivery services, which turned out to be less profitable, does not render performance of tenant’s financial obligations impossible.” Likewise, the force majeure provision is also inapplicable. *See 558 Seventh Ave. Corp.*, 194 A.D.3d at 562.

Finally, the guaranty of defendant Quint is not rendered unenforceable pursuant to New York City Administrative Code § 22-1005. Defendants have provided no factual support for their contention that Tenant’s business had indoor dining, in-person seating, or on-premises consumption at the leased premises. Accordingly, it is hereby

ORDERED that plaintiff is granted leave to amend the complaint to conform to the proofs pursuant to CPLR 3025(c); and it is further

ORDERED that plaintiff's motion for summary judgment on the complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the amount of \$144,240.22, with interest at the rate of 9% per annum from April 1, 2021, until the date of this order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further


ORDERED that defendants' affirmative defenses are hereby dismissed; and it is further

ORDERED that the amount of attorneys' fees to be assessed as against defendants is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

This constitutes the decision and order of the court.

8/4/2022
DATE


SUZANNE ADAMS, J.S.C.

CHECK ONE:

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