

Expressway Plaza I LLC v Fitness Intl., LLC
2022 NY Slip Op 33038(U)
September 8, 2022
Supreme Court, New York County
Docket Number: Index No. 365964/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

INDEX NO. 365964/2020

EXPRESSWAY PLAZA I LLC, FARMINGVILLE ASSOCIATES PHASE 1, LLC

MOTION DATE 11/10/2020, 07/16/2021

Plaintiff,

MOTION SEQ. NO. 002 004

- v -

FITNESS INTERNATIONAL, LLC

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is ORDERED that plaintiffs' motion to dismiss defendant's amended counterclaims (Mot. Seq. No. 002) is granted, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 24, 34), in which the Court concurs. Defendant fails to state a cause of action with respect to its counterclaims (CPLR 3211[a][7]); and it is further

ORDERED that so much of plaintiff's motion for summary judgment (Mot. Seq. No. 004) on their sole cause of action for breach of the lease is granted, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 52, 63), in which the Court concurs. As more specifically set forth therein, plaintiffs established prima facie entitlement to summary judgment by submission of "the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (Thor Gallery at S.

Dekalb, LLC v Reliance Mediaworks (USA) Inc., 143 AD3d 498 [1st Dept 2016]). The unambiguous provisions of the lease require defendant to pay rent “without demand, deductions, set-offs or counterclaims,” and that in the event of “restrictive laws” delaying performance of any act required by the lease of either party, defendant is not excused “from the prompt payment of any rental or other charges required” (NYSCEF Doc. No. 48, §§ 5.3, 22.3). Defendant’s contrary reading of certain provisions of the lease in opposition would render the above cited language meaningless, and thus the Court cannot interpret the lease language as defendant proposes (*e.g. Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). Defendant does not otherwise raise an issue of fact in opposition to the motion; and it is further

ORDERED that so much of plaintiffs’ motion for summary judgment dismissing defendant’s affirmative defenses is granted. Defendant’s silence in its opposition with regard to the 1st through 15th, 17th through 23rd, 28th through 31st, 33rd, and 35th through 38th affirmative defenses renders them subject to dismissal (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017] [“By his silence in his opposition brief, defendant concedes, as plaintiff argues, that the second, third, and sixth affirmative defenses should be dismissed”]).

Regarding defendant’s assertion of defenses of impossibility of performance, impracticability, frustration of purpose, and failure of consideration (24th through 27th and 34th affirmative defenses), the Appellate Division, First Department has largely established that such defenses are not implicated by temporary closures and reduced capacity as a result of the ongoing COVID-19 pandemic (*e.g. Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022] [“We have already rejected plaintiff Gap’s contention that Executive Order No. 202.8 rendered it objectively impossible to perform its operations as a retail store where, as here, Gap filed its complaint after reopening was allowed”]; *Knickerbocker Retail LLC*

v Bruckner Forever Young Social Adult Day Care Inc., 204 AD3d 536, 537 [1st Dept 2022] [“New York City Executive Order No. 100 of 2020 (N.Y.C EEO 100), which, under § 17, directed adult congregate care facilities such as the tenant's to suspend operations during the pandemic, was temporary”]; *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [1st Dept 2022] [“the failure of consideration argument fails for the same reasons that the frustration of purpose and impossibility arguments fail”]). As for the 16th affirmative defense of failure of a condition precedent and the 32nd affirmative defense regarding breaches of various alleged warranties and representations, the language of the lease discloses no such condition precedent to the payment of rent and no actionable breach of warranty or representation by plaintiffs. Any such breach would not, as set forth above, provide a defense to the nonpayment of rent; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant in the amount of \$565,384.29, with statutory interest from April 1, 2020 as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and dismissing defendant's affirmative defenses and counterclaims; and it is further

ORDERED that plaintiffs are entitled to their reasonable attorneys' fees incurred in this action as provided in the lease (NYSCEF Doc. No. 48, § 19.2), 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 Plaintiff's 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/suptmanh 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.

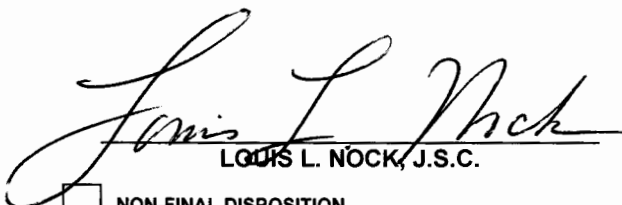
9/8/2022
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<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"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE


 LOUIS L. NOCK, J.S.C.