SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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FC 42ND STREET ASSOCIATES, L.P.,

Plaintiff

-against-

42ND APPLE, LLC,

Defendant

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Index No. 656904/2021

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff is the ground lessee of real property at 234 West 42nd Street, in New York County. Plaintiff leases part of that real property to defendant pursuant to a written lease with various amendments. Defendant leased the premises to operate an "Applebee's Neighborhood Grill & Bar" restaurant. Statement of Material Facts and Counterstatement of Material Facts, NYSCEF Doc. Nos. 92 and 102, ¶ 3. When the original lease was to expire on March 31, 2020, defendant exercised its option for a renewal term through March 31, 2025.

Defendant admits that it began carrying a balance on its rent account in or around June 2019, rather than paying the rent and additional rent in full each month. Id. ¶ 37. On March 16, 2020, the Governor of the State of New York declared a State of Emergency due to the COVID-19 pandemic and signed an Executive

Order that temporarily shut down indoor dining in New York City, including defendant's restaurant. Defendant resumed restaurant operations in June 2021. Plaintiff served a notice of default on defendant in October 2021, for defendant's failure to pay rent and additional rent timely under the lease. After defendant did not pay the outstanding rent and additional rent, plaintiff served defendant November 17, 2021, with a notice of termination of the lease. When defendant did not vacate the premises, plaintiff responded with this action for ejectment and for outstanding rent and additional rent.

II. SUMMARY JUDGMENT

Plaintiff moves for summary judgment. C.P.L.R. § 3212(b). To obtain summary judgment, plaintiff must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material factual issues. Id.; Bill Birds, Inc. v. Stein L. Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). If plaintiff fails to make this evidentiary showing, the court must deny plaintiff's motion. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499,

503 (2012); Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021). Only if plaintiff meets its initial burden, does the burden shift to defendant to rebut that prima facie showing by producing admissible evidence sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein L. Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of plaintiff's motion, the court construes the evidence in the light most favorable to defendant. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d at 475; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

Defendant does not dispute that it entered a valid and enforceable lease with plaintiff, that plaintiff performed by providing access to the premises, or that defendant did not pay the full amount of rent required by the lease. Thus, plaintiff has established a prima facie claim entitling plaintiff to summary judgment, shifting the burden to defendant to show material factual issues.

III. DEFENDANT'S REBUTTAL

Defendant contends that the COVID-19 pandemic frustrated the lease's purpose and rendered defendant's performance impossible, and the governmental restrictions in response to the pandemic entitled defendant to a rent abatement. Therefore, according to defendant, since it does not owe the full amount of rent and additional rent under the lease, the notice of termination sent by plaintiff was incorrect about the amount of rent and additional rent owed and was ineffective to terminate the lease.

A. Impossibility and Frustration of Purpose

The doctrine of impossibility excuses performance of a contract by a party only when performance becomes objectively impossible because the subject of the contract or the party's means of performing has been destroyed. Kel Kim Corp. v Central Markets, Inc., 70 N.Y.2d 900, 902 (1987); Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 206 A.D.3d 503, 504 (1st Dep't 2022); Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 203 A.D.3d 480, 480 (1st Dep't 2022). Financial hardship does not qualify as impossibility excusing performance of a contract. Urban Archaeology Ltd. v. 207 E. 57th St. LLC, 68 A.D.3d 562, 562 (1st Dep't 2009). The performance required of defendant was its payment of rent. While defendant may not have been operating profitably, nothing prohibited it from paying rent. "[W]here performance is possible, albeit unprofitable, the legal excuse of

impossibility is not available." Warner v Kaplan, 71 A.D.3d 1, 5 (1st Dep't 2009).

Due to the COVID-19 pandemic, the New York State Governor issued executive orders declaring a State disaster emergency, Executive Order No. 202, and prohibited restaurants and bars from serving patrons on-premises as of March 16, 2020, Executive Order No. 202.3, among other restrictions. The restrictions allowed restaurants, such as the defendant's, to provide take-out and delivery food and bar services. Id. In June 2020, Executive Order 202.38 authorized outdoor dining.

The COVID-19 pandemic and ensuing restrictions do not excuse lease obligations on the basis of frustration of purpose or impossibility. Fives 160th, LLC v. Zhao, 204 A.D.3d 439, 440 (1st Dep't 2022); 558 Seventh Ave. Corp. v. Times Square Photo Inc., 194 A.D.3d 561, 562 (1st Dep't 2021). The frustration of purpose defense requires defendant to be completely deprived of the ability to use the premises as contemplated by the lease. Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 206 A.D.3d at 504. "[T]emporary governmental restrictions on in-person operations" do not qualify. Id. (quoting Valentino U.S.A., Inc. v. 693 Fifth Owner LLC, 203 A.D.3d at 480). Although the restrictions may have rendered defendant's operation of its restaurant more difficult and less profitable, defendant was not totally prevented from conducting business, since defendant was allowed

to provide take-out and delivery services, and the restrictions were for a short period relative to the term of the lease, which extended from September 1999 through March 2025. Even if the outdoor dining authorized in June 2020 rendered defendant's restaurant operations more difficult and less profitable until indoor dining fully resumed in June 2021, an interruption of 15 months out of 306 does not amount to complete deprivation.

Defendant points out that the lease requires defendant to operate the premises as a "dignified, first-class and reputable casual dining restaurant and bar" with service "primarily by waiters and waitresses at tables." Aff. of Deborah Riegel, Ex. B (Original Lease), NYSCEF Doc. No. 50, § 4.01. The lease also obligates defendant to remain open for business throughout the entire premises. Id. § 4.04. The lease's force majeure provision, however, specifically addresses defendant's situation during the March - June 2020 restrictions and to the extent they continued to June 2021. If "Tenant is delayed or prevented from performing any of its . . . obligations because of . . . governmental restrictions . . . , then the period of such delays shall be deemed added to the time herein provided for the performance of any such obligation . . . , provided, however, that this Section 37.05 shall not . . . affect Tenant's obligation to pay Rent." Id. § 37.05. According to the parties' bargain, while government restrictions may excuse delays in

fulfilling other obligations, those restrictions never excused the payment of rent. Therefore, under no circumstances does the doctrine of impossibility or frustration of purpose protect defendant from its obligation to pay rent.

B. Abatement of Rent Pursuant to the Lease

Defendant also invokes § 21.03 of the lease, which provides for the abatement of rent in the event a casualty renders part of the premises untenantable. That lease section does not apply to the facts at hand, but refers instead to an event that causes physical damage to the premises creating a need for repairs, not a pandemic or governmental restrictions. Andreas v. 186 Tenants Corp., 208 A.D.3d 406, 407-408 (1st Dep't 2022); Gap, Inc. v. 170 Broadway Retail Owner, LLC, 195 A.D.3d at 577. The premises were not damaged, destroyed, or rendered untenantable. While defendant contends that the lease provision offers a rent abatement under circumstances broader than physical damage, the lease provision unambiguously demonstrates that the parties intended to allow a rent abatement only in the event of physical causes of untenantability, shutting down all or part of the premises for necessary restoration work. Not only did the pandemic and associated restrictions cause no physical damage, but the restrictions also were merely temporary and did not necessitate any restoration or repairs.

C. Notice of Termination and Other Defenses

Defendant insists that, because it was excused from paying part of the rent, the notice of termination was incorrect about the amount of rent owed and so was ineffective. Since, as discussed above, defendant was not excused from paying rent, this defense also fails. The notice of termination was effective.

While defendant's answer also raised affirmative defenses of failure of consideration, illegality, enforcement of the lease being contrary to public policy, failure to mitigate damages, and misrepresentation that the contemplated use was permitted by law, defendant does not raise any of these defenses in response to plaintiff's motion, let alone present evidence to support them. Once faced with plaintiff's motion for summary judgment, defendant must raise and support its defenses, or, if the court grants plaintiff summary judgment, defendant's abandoned defenses will not avail defendant further.

IV. CONCLUSION

The rebuttal defendant has presented is unavailing. The COVID-19 pandemic and resulting restrictions did not relieve or suspend defendant's obligations to pay rent and additional rent in full pursuant to the lease. Defendant does not dispute that it failed to make those payments. Therefore the court grants plaintiff's motion for summary judgment. C.P.L.R. § 3212(b). Plaintiff shall settle a judgment 20 days after entry of this

Decision and Order, granting plaintiff ejectment and a writ of assistance, overdue rent and additional rent until issuance of the writ, and 9% statutory interest from the date each rent payment was due or a reasonable intermediate date. C.P.L.R. §§ 5001, 5004; Trumbull Equities LLC v. Mt. Hawley Ins. Co., 191 A.D.3d 587, 587 (1st Dep't 2021). Plaintiff has waived any enhanced or accelerated rent after termination of defendant's tenancy. If the parties do not settle the amount to be awarded for plaintiff's attorneys' fees claim, the proposed judgment shall refer the amount of attorneys' fees owed to plaintiff to a Special Referee to hear and determine, as the parties stipulated on the record June 23, 2022. C.P.L.R. § 4317.

DATED: September 23, 2022

LUCY BILLINGS, J.S.C.

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J.S.C.