

ESRT Empire State Bldg., L.L.C. v MG Holding Corp.
2022 NY Slip Op 33348(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 156490/2020
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

-----X

ESRT EMPIRE STATE BUILDING, L.L.C.,

Plaintiff,

- v -

MG HOLDING CORP., BELL & COMPANY, INC.

Defendant.

-----X

INDEX NO. 156490/2020

MOTION DATE 04/29/2022

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, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

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

In this breach of contract case, plaintiff ESRT Empire State Building, L.L.C. moves, pursuant to CPLR 3212, for summary judgment against defendants MG Holding Corp. and Bell & Company, Inc. Defendants oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

A. Factual and Procedural Background

Plaintiff is an LLC which owns the Empire State Building ("Empire" or "Landlord"). (Compl., ¶¶1, 5; docket no. 1). Empire's predecessor signed a lease in 2004 with defendant MG Holding Corp. ("MG" or "Tenant") to lease space on the 77th floor of the building (suite 7710). (Neville Aff., Ex. E; docket no. 16). The lease also included storage space in the basement. Defendant Bell & Company, Inc. ("Bell" or the "Guarantor") guaranteed payments due under the lease. (Neville Aff., Ex. J; docket no. 21). Martin M. Bell, a CPA and managing member of MG, as well as the president of Bell, ran a small accounting practice out of the space

for 40 years. (Bell Aff., ¶3, docket no. 44). The lease was amended several times after 2004, principally to extend the term and adjust the rent and location of the storage space in the basement. (Neville Aff., Exs. K-N; docket nos. 17-20). From May 1, 2019 to April 30, 2020 the rent was \$219,066 per year (\$18,255 per month) and from May 1, 2020 to April 30, 2021 the rent was \$223,447 per year (\$18,621 per month), plus \$4500 per year (\$375 per month) for the storage space. (Compl., ¶¶6-7 and documents there cited; docket no. 1) (see also Melendez Aff., and documents there cited; docket no. 10). MG was also obligated to pay its share of real estate taxes, electricity, and other expenses. Since MG has vacated the space (Bell Aff. ¶7; docket no. 44), the only issue to be determined is defendants' liability, if any, for the rent.

B. Defenses and Counterclaims

Defendants assert a number of defenses and counterclaims, all related in one way or another to the Covid-19 pandemic and the related State and City shutdown orders at the outset of the pandemic. (See Verified Answer and Counterclaims, docket no. 2). The counterclaims principally challenge Empire's application of the security deposit towards outstanding rent, and they rest on the validity of the defenses. Despite the numerous defenses asserted in defendants' Verified Answer, their papers in opposition to this motion assert only frustration of purpose and impossibility of performance based on what they maintain was their inability to use the space in the early days of the pandemic due to the shutdown orders. (*See* Berkowitz Aff. and Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, docket nos. 44-45).

C. Relevant Lease Provisions

The relevant lease provisions at issue here are as follows. Article 11 of the lease provides:

“A. If the premises shall be partially damaged by fire or other casualty, the damage shall be repaired at the expense of Landlord. . . . The rent shall abate in proportion to the portion of the premises not usable by Tenant.”

Empire asserts there was no damage or other casualty to the property from Covid-19, so there should be no abatement of the rent.

Article 15 of the Lease provides:

“A. Tenant, at its expense shall comply with all laws, orders and regulations of any government authority having or asserting jurisdiction over the premises, which shall impose any violation, order or duty upon Landlord or Tenant with respect to the premises or the use or occupancy thereof. . . .”

Empire asserts that it was therefore the Tenant's responsibility to comply with the shutdown orders, at its own expense, and not at the expense of the Landlord.

Article 22 of the lease provides:

“LANDLORD’S LIABILITY

If, by reason of. . . (iv) any rule, order or regulation of any governmental agency. . . Landlord does not fulfill any obligation under this lease or shall be unable to supply any service which Landlord is obligated to supply, this lease and Tenant’s obligation to pay rent hereunder shall in no wise be affected, impaired or excused.”

Empire contends that, according to this provision, the shutdown orders did not relieve the Tenant of its obligation to pay rent.

Article 48 of the lease provides:

“ADDITIONAL DEFINITIONS

. . . Wherever herein Tenant is required to comply with laws, orders and regulations of any governmental authority having or asserting jurisdiction over the demises premises. . . . References to Landlord as having no liability to Tenant or

being without liability to Tenant shall mean that, except as otherwise provided in this lease, Tenant is not entitled to...claim actual or constructive eviction, partial or total, or to receive any abatement or diminution of rent, or to be relieved in any manner of any of its other obligations hereunder...”

Empire claims that this provision also allocates the risk of an event like the Covid-19 pandemic to the Tenant.

D. Standards for Summary Judgment

In order to establish its prima facie entitlement to summary judgment, a party must tender sufficient evidence to demonstrate the absence of material issues of fact. (*See Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If this prima facie showing is made, the burden shifts to the opposing party to produce evidence in admissible form that there is in fact a triable issue of fact. (*Id.*) (*See also Gammons v City of New York*, 24 NY3d 562 [2014]). Because summary judgment deprives a litigant of his day in court, “evidence should be analyzed in the light most favorable to the party opposing the motion.” (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). But bare or conclusory allegations or assertions are insufficient to create genuine issues of material fact sufficient to defeat a motion for summary judgment. (*See Zuckerman v City of New York*, 49 NY2d 557 (1980)). For the reasons set forth below, Plaintiff has amply satisfied these standards.

E. Statement of Undisputed Material Facts

Preliminarily, Empire argues that it filed a statement of undisputed material facts on this motion for summary judgment, pursuant to Uniform Rule 202.8-g, to which defendants did not respond as required by Uniform Rule 202.8-g(c). (Neville Reply Aff., ¶9; docket no. 46). Empire therefore asks that all of its alleged facts be deemed admitted, and its motion effectively be granted on default. Although Empire correctly asserts that Defendants did not comply with these provisions of the Uniform Rules, and that its statement of material facts may

be deemed admitted, this Court, in the exercise of its discretion, will nevertheless consider the matter on the merits (*see generally Moonstone Judge, LLC v Shainwald*, 38 AD3d 215 [1st Dept 2007] [court properly exercised its discretion in deeming plaintiff's unopposed factual statements admitted]).

F. Legal Analysis

The Covid-19 pandemic and the related shutdown orders have generated a substantial amount of commercial lease litigation, in which tenants generally assert that they should be forgiven for their failure to pay rent since they could not use, or were effectively prevented from using, their leased space. The defenses of frustration and impossibility raised here have been raised by many other tenants which have been sued. Thus, there is considerable precedent in this area of the law.

In *Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536 (1st Dept 2022), for example, the First Department dealt with a case alleging breach of lease, ejectment and enforcement of a guaranty when a tenant stopped paying rent in March 2020 because the pandemic shutdown led to a cessation of services at its site. The First Department rejected the defense of frustration of purpose, holding that the entire purpose of a 10-year lease was not completely defeated by the shutdowns. It further ruled that the defense of impossibility should also be dismissed, because neither the subject matter of the contract nor the means of performance was destroyed. The court therefore granted a judgment for the rent, ordered ejectment, and enforced the guaranty.

That same logic applies here. The lease in this case dates back to 2004 and the entire purpose of the lease over its life, to provide professional accounting services in the space, was far from completely frustrated. Likewise, the pandemic did not destroy the building and, after a

period of time, the Tenant could have used the space to continue to provide accounting services instead of working at home, even if clients dealt with the accountants in the firm remotely instead of coming into the office to meet, and even if all the accountants at the firm did not come into the office each and every day (*See 558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561 [1st Dept 2021] [citations omitted] [rejecting defenses of frustration and impossibility in Covid-related commercial lease case]; *The Gap Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021] [Covid-related claims for rent abatement, frustration, impossibility, force majeure and a Yellowstone injunction were all rejected]).

In *A/R Retail LLC v Hugo Boss Retail, Inc.*, 72 Misc3d 627 (Sup Ct NY County 2021), this Court (Hon. Joel Cohen, J.) rejected defenses of frustration, impossibility and force majeure in a case involving temporary closure of a retail business due to Covid. Justice Joel Cohen reasoned that, although the impact of Covid was undeniably significant, he could not conclude that the entire purpose of the lease was frustrated or that it was impossible for the tenant to perform where the lease was for a 13-year term with more than a year remaining until it expired.

The undersigned has also rejected the defenses asserted here in a commercial lease case arising from the pandemic (*See 55 Broadway Realty LLC v Houston Upholstery Co., Inc.*, 2021 NY Slip Op 32608[U] [Sup Ct New York County 2021]) and sees no reason to depart from the reasoning set forth therein.

The principal case relied on by the Tenant, *Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC*, 202 AD3d 641 (1st Dept 2022), is distinguishable. In *Schulte*, the First Department affirmed the denial of summary judgment to the landlord, finding an ambiguity in the lease provisions at issue. Section 5.4 of that lease provided that the tenant was entitled to a rent abatement if:

"Tenant [was] unable to use the Premises,...due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements...other than as a result of Unreasonable Delays or Tenant Delays (or, if Tenant's inability to use the Premises...result[ed], in whole or in part, from Unavoidable Delays and such condition continue[d] for a period in excess of fifteen (15) Business Days)."

Based on this language, the First Department reasoned that the lease could be interpreted to provide for a rent abatement only if the tenant's inability to use the premises was caused by the landlord's breach, in which case the landlord would prevail, since the Covid pandemic did not constitute a breach by the landlord. On the other hand, based on the placement of the parentheses, the lease could have also been plausibly construed to provide for a rent abatement if either (1) there were a breach by the landlord, or (2) there were unavoidable delays continuing for more than 15 business days. In the second case, the lease could be read to provide for a rent abatement since the pandemic lockdowns lasted for more than 15 business days. Thus, the court found an ambiguity that precluded summary judgment.

In this case, there is no comparable language in the Empire lease which could be interpreted to support the Tenant's defenses. On the contrary, the relevant lease language supports the Landlord's claim for summary judgment.

Here, the Tenant relies on Article 11 of the lease, which provides that, if the premises are partially damaged by fire or other casualty, it is the landlord's obligation to repair the premises at the landlord's expense. The provision also reads that "The rent shall abate in proportion to the portion of the premises not usable by Tenant." The Tenant here argues that the second sentence means that its rent should be entirely abated since it could not use any portion of the space due to the shutdowns. However, this argument is strained since the foregoing abatement language appears in an article entitled "Destruction", which clearly pertains to physical destruction or damage to the premises. Here, there was no casualty loss to the premises due to Covid and, thus,

this article does not apply. In fact, in *The Gap Inc., supra*, the First Department ruled that Covid did not constitute a casualty loss under a similar commercial lease provision.

Other provisions of the lease support the Landlord's interpretation and position. Article 15 of the lease provides that "Tenant, at its own expense, shall comply with all laws, orders and regulations of any government authority," including the shutdown orders, and Article 22 provides that if Landlord fails to comply with any obligation under the lease, including any service the Landlord is supposed to provide, "this lease and Tenant's obligation to pay rent hereunder shall in no wise be affected, impaired or excused."

G. The Guaranty

As noted previously, Bell guaranteed the lease. In the Verified Answer, Bell alleges that the guaranty it signed in 2016, in connection with the Third Amendment to the lease, was of no force and effect since Bell was dissolved in 2010. (Verified Answer and Counterclaims, ¶¶53-59; docket no. 2). Apparently Bell was the entity through which Mr. Bell conducted his accounting practice. If Mr. Bell signed a guaranty on behalf of the dissolved entity, he is personally liable unless the contract was necessary to wind up the company's affairs, and there is no evidence that this was the case here. (*See Penn Bldg. Co. v Schaub*, 14 AD3d 365, 366 [1st Dept 2005]). Landlord, however, concedes that, if the Court finds against Bell, and/or its successor, Bell & Company, LLP, it will not seek a judgment against Mr. Bell personally since it only asks for that relief "in the alternative." (Neville Reply Aff., ¶37; docket no. 46) (see also Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, at p. 7; docket

no. 11). If both MG and Bell lack assets to pay the judgment, the Court will allow post-judgment discovery against Bell & Company, LLP as successor to Bell.¹

H. Discovery

Tenant asserts that it is entitled to discovery before summary judgment can be granted. (Berkowitz Aff., ¶7; docket no. 43). However, there are no material disputed facts as to liability. There is a lease, there is a default in rent payments, and the proffered reasons for the default relate to the Covid pandemic. Whether the pandemic constitutes an excuse for payment under the doctrines of frustration and impossibility presents issues of law, not fact, particularly in view of what is now established precedent rejecting those defenses as a matter of law.

The principal discovery sought is whether the Landlord received any PPP loans or other public subsidy payments on account of Covid. (*Id.*, ¶8; see also Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, p. 6; docket no. 45). Tenant asserts, in essence, that if the Landlord received any subsidy payments and also is awarded a judgment for the rent, it would obtain a double recovery. However, plaintiff correctly asserts that, pursuant to Articles 2 and 48 of the Lease, the defendant was obligated to pay the rent without any set off or reduction. Doc. 49 at 9; Doc. 16 at pars. 2, 48.

I. Damages

The Tenant, which vacated the premises in April 2021, did not make a rent payment after February 1, 2020. In an affidavit in support of the motion, Maxx Melendez, the Accounts

¹ Bell also asserts that it cannot be liable on the guaranty as the guaranty refers to a lease dated July 27, 2004, and "[t}here is NO such lease (emphasis in original)." (Verified Answer and Counterclaims, ¶56; docket no. 2) The lease was actually dated August 24, 2004 and the date in the guaranty is plainly a scrivener's error. (Neville Aff., ¶48; docket no. 9) In any event, the guaranty was later ratified in connection with the various amendments to the lease which were executed over time (*Id.*, see also, Neville Aff., Exs. E-G, docket nos. 17-19).

Receivable Collections Associate for Plaintiff's managing agent, attests that, through April 2021, Defendants owed Plaintiff "a total of \$380,568.82 in fixed rent, additional rent, and replenishment of the security deposit" plus attorneys' fees, costs and expenses incurred. Doc. 10. Therefore, summary judgment is granted in this amount, plus interest from March 1, 2020.

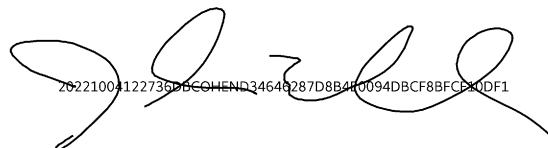
Plaintiff seeks legal fees and costs in the amount of \$26,393. (Neville Aff., ¶¶38-41; docket no. 9). Article 6 of the lease and Article 5.2 of the guaranty both provide for attorneys' fees to be recoverable in the event litigation has to be commenced to enforce the lease or the guaranty. As the prevailing party, Landlord is entitled to recover reasonable fees and expenses, and the defendants have not objected to the reasonableness of the request, which this Court deems to be reasonable as well. Landlord attached the bills to its motion. (Neville Aff., Exs. R-S; docket nos. 28-30). Accordingly, this Court grants summary judgment for this amount as well.

Accordingly, it is hereby:

ORDERED that the motion for summary judgment by plaintiff ESRT Empire State Building, L.L.C. is granted as against defendants MG Holding Corp. and Bell & Company, Inc. as to liability, jointly and severally, in the amount of \$380,568.82, plus interest at a rate of 9% per annum from September 1, 2020 until the date of entry of this order, and thereafter at the statutory rate, as calculated by the Clerk, as well as attorneys' fees of \$26,393; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order, with notice of entry, upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon 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).



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10/4/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE