

63rd St. Owner, LLC v Eldib
2023 NY Slip Op 30059(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 158887/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

63RD STREET OWNER, LLC

Plaintiff,

- v -

MOHAMED ELDIB,

Defendant.

-----X

INDEX NO. 158887/2022

MOTION DATE 01/06/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14

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

Plaintiff’s motion for summary judgment and to dismiss defendant’s affirmative defenses and counterclaims is granted.

Background

Plaintiff seeks summary judgment in this unpaid rent case. It contends that defendant stopped paying rent in March 2019 and made only sporadic payments before vacating the apartment in May 2022. Plaintiff claims that \$103,500 is due. It argues that defendant’s counterclaim for “bad faith negotiating” is contravened by the fact that the parties entered into a settlement (with both sides represented by an attorney) concerning plaintiff’s demand for possession of the apartment.

In opposition, defendant contends that when he entered into the subject lease, the rent was nearly fifty percent of his income. He contends that the pandemic hindered his ability to pay rent and that he had to deal with an unfortunate family situation in Egypt. Defendant insists that

once he realized he could no longer pay the rent, he tried to get alternative accommodations so he could vacate the apartment but that he was unable to do so.

Defendant acknowledges that while the defense of impossibility does not excuse the missed payments, he claims that this defense could be used to excuse his ability to vacate sooner. He claims he simply had no reasonable opportunity to mitigate the damages.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion. As an initial matter, there is no dispute that defendant owes unpaid rent.

The central question in this motion is whether defendant can raise a defense of impossibility with respect to his ability to mitigate damages. “The doctrine of impossibility . . . excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible” (*Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504 [1st Dept 2022], *lv to appeal dismissed*, 39 NY3d 938 [2022]). The First Department has held that COVID-19 restrictions do not constitute a cognizable defense to commercial tenants’ obligation to pay rent (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577, 151 NYS3d 37 [1st Dept 2021]). There is no basis to find that the doctrine of impossibility applies to residential tenants seeking relief based on COVID-19 restrictions.

Unfortunately, defendant’s contention that he be allowed to raise issues about his ability to mitigate damages is wholly unsupported and does not compel the Court to deny the instant motion. Defendant did not cite any binding authority for the proposition that he can, essentially, get some sort of a credit because of the pandemic. The fact is that the subject lease involved an obligation by plaintiff to provide an apartment (which it did) in exchange for defendant’s responsibility to pay rent (which he admits he did not). Defendant got the benefit of the apartment, while not paying any rent for years—he cannot evade his obligation to pay rent.

The Court recognizes that defendant, like many people, may have suffered financially and personally as a result of the pandemic. But those struggles and challenges are outside the scope of the agreement with plaintiff. Defendant’s affirmative defenses for failure to state a

cause of action, impossibility and based upon force majeure are accordingly severed and dismissed.

Moreover, defendant’s counterclaim for legal fees related to purported bad faith negotiating is also severed and dismissed. The opposition papers did not specifically mention the counterclaim and it is unclear on what basis he could get legal fees when he did not pay the rent.

The Court also observes that defendant did not oppose the amount requested by defendant.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted, defendant’s affirmative defense and counterclaim are severed and dismissed, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$103,500 plus interest from May 1, 2021 (a reasonable midpoint) along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees is severed and plaintiff must make a separate motion for such fees on or before January 31, 2023 (the moving papers did not include any invoices or make a specific demand).

1/9/2023
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: