Daval 36 Assoc., LLC v Carlos Campos N.Y. LLC
2023 NY Slip Op 32003(U)
June 12, 2023
Supreme Court, New York County
Docket Number: Index No. 656606/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** — ***Justice*** — **PART** **42**

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DAVAL 36 ASSOCIATES, LLC,

Plaintiff,

- v -

CARLOS CAMPOS NEW YORK LLC, CARLOS CAMPOS,

Defendants.

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INDEX NO. 656606/2021

MOTION DATE 02/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for SUMMARY JUDGMENT.

In this breach of contract action to recover unpaid rent, additional rent and contractual attorneys' fees due under a commercial lease and associated personal guaranty, the plaintiff landlord, owner of the property located at 15 West 36th Street in Manhattan, moves pursuant to CPLR 3212 for summary judgment on the complaint, pursuant to CPLR 3211(b) for dismissal of the affirmative defenses asserted by the defendants, and pursuant to CPLR 3025(c) to amend the complaint by correcting the name of the first defendant and adding additional rent that has accrued since the inception of this action. The defendants, a designer clothing and accessories business and its owner, who leased the second floor of the plaintiff's building for use as office space and a design showroom, oppose the motion. The motion is granted in part.

As an initial matter, the plaintiff seeks to amend the complaint to: (i) alter the caption to read "Carlos Campos LLC d/b/a Carlos Campos New York LLC," with respect to the first named defendant; and (ii) reflect the rent and additional rent that has accrued since the complaint was filed. Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). It is also settled law that where, as here, pleadings have

been served under a misnomer upon the party which the plaintiff intended as a defendant, and the misnomer could not possibly have misled the defendant as to who it was that the plaintiff was in fact seeking to sue, the court should allow an amendment to correct the error. See CPLR 305(c); 3025(b); Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Avenue LLC, 189 AD3d 524 (1st Dept. 2020); Duncan v Emerald Expositions, LLC, 186 AD3d 1321 (2nd Dept. 2020). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). Defendants do not oppose this aspect of the plaintiff's motion. Accordingly, the branch of the plaintiff's motion seeking to amend the complaint is granted insofar as it seeks to alter the caption.

To the extent that the plaintiff also seeks to amend the complaint to include a demand for additional rent that has accrued since the filing of the complaint, that relief is granted to the extent that plaintiff may seek sums accrued through the filing of the instant motion, August 15, 2022. To the extent the plaintiff seeks to amend its pleading to include "additional damages incurred through the date of entry of judgment," its application is denied. As a general matter, "no action can be brought for future rent in the absence of an acceleration clause." Beaumont Offset Corp. v Zito, 256 AD2d 372, 373 (2nd Dept. 1998); see also Islip U-Slip LLC v Gander Mtn. Co., 2 F Supp 3d 296, 303 (NDNY 2014) ("New York law states that absent an acceleration clause in a lease, the breach of a lease does not entitle a landlord to make a claim for all future rents under the lease."). The lease at issue here contains no such clause. The plaintiff has elected to move for summary judgment on its claims seeking rent owed through August 15, 2022. The plaintiff cannot also elect to maintain such claims to the extent they would only seek future rents.

It is well-settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed

in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). In support of its motion, the plaintiff submits the pleadings, the subject lease and personal guaranty agreements, default notices sent to the defendants, a rent ledger, and the affidavit of its Managing Agent, Mel G. Farrell.

The plaintiff's proof establishes, *prima facie*, its entitlement to relief on its first cause of action for breach of the lease agreement against defendant Carlos Campos LLC d/b/a Carlos Campos New York LLC ("Tenant"). Specifically, the plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) the Tenant's breach of that contract by, *inter alia*, failing to pay any rent or additional rent since April 2020, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009).

The defendants' arguments in opposition to summary judgment on the first cause of action are unavailing. The defendants' principally argue that the Tenant was contractually excused from paying a portion of the rent allegedly due because the COVID-19 pandemic and its resulting government-imposed lockdowns constituted a "casualty" within the meaning of Paragraph 9 of the lease, which provides, in relevant part, that, "if the demised premises are totally damaged or rendered wholly unusable by fire or other casualty," the Tenant's obligation to pay rent shall cease "until the date when the premises shall have been repaired and restored by Owner . . . ." However, a review of Paragraph 9, which refers multiple times to a "fire or other casualty" and resulting "damage" to the premises requiring "repair" by the plaintiff, makes clear that "casualty" refers to "singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown." See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575, 577 (1st Dept. 2021) (citing cases); see also Gap Inc. v Ponte Gadea New York LLC, 2021 WL 861121, *6 (S.D.N.Y. March 8, 2021).

Accordingly, the Court concludes that the COVID-19 pandemic and its effects did not constitute a casualty under Paragraph 9 of the lease.

Further, insofar as the defendants' opposition papers can be read as invoking the doctrines of frustration of purpose or impossibility of performance, neither doctrine is applicable. The frustration of purpose doctrine "offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract." Structure Tone, Inc. v Universal Services Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020) (quoting Warner v Kaplan, 71 AD3d 1, 6 [1st Dept. 2009]) (quotation marks omitted).

Importantly, frustration of purpose is not available "where the event which prevented performance was foreseeable and provision could have been made for its occurrence." Id. at 43 (quoting Warner v Kaplan, supra at 6) (quotation marks omitted). Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021).

Similarly, impossibility is a defense to a breach of contract action "only when . . . performance [is rendered] objectively impossible . . . by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). Put differently, impossibility may excuse performance of a contract if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable. RW Holdings, LLC v Mayer, 131 AD3d 1228 (2nd Dept. 2015) (quoting Pleasant Hill Dev., Inc. v Foxwood Enters., LLC, 65 AD3d 1203 [2nd Dept. 2009]).

The plaintiff points to Paragraph 27 of the lease as proof that the pandemic and its associated government restrictions were foreseeable, rendering frustration of purpose and impossibility of performance inapplicable. Paragraph 27 provides:

> This lease and the obligation of Tenant to pay rent hereunder and perform all the other covenants and agreements hereunder on part of Tenant to be performed shall in no way be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease… if Owner is prevented or delayed from doing so by reason of strike or labor troubles, or any cause whatsoever beyond Owner's sole control including, but not limited to, government preemption or restrictions, or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency, or by reason of the conditions which have been or are affected by war or other emergency.

The intended effect of Paragraph 27 is clear: the Tenant is not absolved of its obligation to pay rent if the plaintiff is unable to fulfill any obligations under the lease, including making the premises available to the Tenant for its intended use, where such inability is the result of, *inter alia*, "government preemption or restrictions," or "any rule, order or regulations of any department or subdivision thereof of any government agency." In other words, the parties did not contract to excuse the Tenant's rent payments if it were forced to shut down due to government orders, as is the case here. Since Paragraph 27 expressly allocated the foregoing risk to the Tenant, the frustration of purpose and impossibility defenses are unavailable.

Moreover, the defendants have not shown that the COVID-19 pandemic "so completely" frustrated the purpose of the lease that, had it been foreseen, the "transaction would have made little sense." Center for Specialty Care, Inc. v CSC Acquisition I, LLC, supra at 42. In his affidavit submitted in opposition to the plaintiff's motion, defendant Carlos Campos states that, due to the pandemic and related lockdowns, his company was unable to use the Premises for customer visits and, more importantly, suffered a severe downturn in business, causing it to be unable to keep up with its rent payments. However, these statements do not explain how the restrictions on in-person business prevented the defendants from operating their business in *any* capacity, even if such operations were less profitable. For example, the defendants were free to continue offering their products for sale online, as they evidently were already doing and continued to do at least up until the time this litigation was commenced. Similarly, the

diminished profitability of the defendants' business model, even if a consequence of circumstances beyond their control, does not amount to complete frustration of the purpose of the lease. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra. Indeed, the temporary, if relatively lengthy, governmental restrictions on in-person business do not serve to frustrate the overall purpose of a ten-year lease. See 558 Seventh Ave. Corp. v Times Square Photo, Inc., supra (temporary shuttering of electronics and repair store due to executive orders did not frustrate purpose of lease). In sum, the Appellate Division, First Department has been clear that a business's becoming less profitable due to the COVID-19 pandemic and attendant government restrictions is not sufficient reason to excuse performance under a lease on the ground of frustration of purpose or impossibility of performance. See Gap, Inc. v 170 Broadway Retail Owner, LLC, supra; 558 Seventh Ave. Corp. v Times Square Photo Inc., supra.

The plaintiff's proof thus demonstrates the Tenant's liability for unpaid rent and additional rent from April 2020 through the filing date of the present motion. The plaintiff further establishes its entitlement to judgment on the issue of liability with respect to contractual attorneys' fees pursuant to Paragraph 58 of the lease.

The rent ledger submitted by the plaintiff records an unpaid balance of $485,454.75 as of August 1, 2022, shortly before the present motion was filed. The Court notes, however, that the rent ledger does not account for the plaintiff's application, in or about April 2021, of a portion of the Tenant's security deposit equaling $99,800.00 toward the balance of the Tenant's unpaid rent. Accordingly, the Court grants summary judgment to the plaintiff on its first cause of action for breach of contract against the Tenant in the sum of $385,654.75 (i.e., the unpaid balance reflected in the rent ledger less the amount of the security deposit), together with reasonable attorneys' fees.

The plaintiff's proof also establishes, *prima facie*, its entitlement to relief on its second cause of action against defendant Carlos Campos for breach of the personal guaranty he executed in connection with the signing of the Tenant's lease agreement. Specifically, the plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) Mr. Campos's breach, and (4) resulting damages.

There is some dispute between the parties as to whether Mr. Campos's liability under the personal guaranty he executed for the Tenant's unpaid rent should be limited to the period subsequent to June 30, 2021, to account for the provisions of New York City Administrative Code § 22-1005. The Court need not reach this issue, however, because the second cause of action in the plaintiff's complaint, which the plaintiff has not sought to amend, expressly states that recovery is sought as against Mr. Campos solely for unpaid rent and additional rent that accrued after June 30, 2021.

The parties also dispute whether Mr. Campos's liability extends beyond February 23, 2022, the date that he, on behalf of the Tenant, vacated the Premises and returned the keys thereto. According to the terms of the guaranty, Mr. Campos guaranteed the performance of the Tenant's obligations under the lease agreement, including, as relevant here, "the payment of Fixed and Additional Rent which accrue under the Lease up to and including the date Tenant . . . vacate[s] the entire Demised Premises, [and] deliver[s] the keys therefor . . . ." In opposition to the plaintiff's motion, Mr. Campos submits a sworn affidavit stating that, on February 23, 2022, he cleared all of the Tenant's property from the Premises and, having been informed that the Building's Superintendent was absent that day, returned the keys to the Premises to the Building's doorman. Although Mr. Farrell, the plaintiff's Managing Agent, states in his own affidavit that the "Tenant did not deliver the keys" upon vacating the Premises, this conclusory statement, without more, is insufficient to rebut Mr. Campos's detailed testimony, and thus fails to raise a triable issue of fact.

The rent ledger submitted by the plaintiff records an unpaid balance, as of July 1, 2021, of $248,006.51, increasing to $384,220.40 through February 1, 2022. Accordingly, the Court grants summary judgment to the plaintiff on its second cause of action for breach of the guaranty against Mr. Campos in the sum of $136,213.89 for his failure to pay the rent and additional rent owed by the Tenant for the period of July 1, 2021 through February 23, 2022, together with reasonable contractual attorneys' fees owed by the Tenant under the lease agreement.

The branch of the plaintiff's motion seeking to strike the defendants' affirmative defenses is also granted. Pursuant to CPLR 3211(b), a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The burden is on the

plaintiff to demonstrate that the defenses are without merit as a matter of law. See Granite State Ins. Co. v Transatlantic Reinsurance Co., 132 AD3d 479 (1st Dept. 2015); 534 East 11th Street Housing Dev. Fund v Hendrick, 90 AD3d 541 (1st Dept. 2011). The affirmative defenses based on the casualty clause in the lease agreement and the doctrines of frustration of purpose and impossibility of performance are dismissed for the reasons already discussed above. The defendants' remaining affirmative defenses are dismissed for the reasons discussed in the plaintiff's moving papers. Notably, several of the affirmative defenses are improperly asserted in a conclusory manner in the answer without any detail. See Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1st Dept. 2009); Mfrs.Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991). CPLR 3013 expressly requires that all "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Finally, there is no merit to the defendants' argument that the plaintiff's motion is premature due to outstanding discovery. While discovery has yet to commence, the defendants "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421, 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, supra; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

Accordingly, it is

ORDERED that the branch of the plaintiff's motion seeking to amend the complaint is granted to the extent that it seeks to: (i) alter the caption to read "Carlos Campos LLC d/b/a Carlos Campos New York LLC," with respect to the first named defendant, and (ii) add additional unpaid rent accrued since the filing of the complaint and up to the filing of the present

motion on August 15, 2022, for a total unpaid balance of $385,654.75, and is otherwise denied; and it is further

ORDERED that the caption is hereby amended to appear as follows:

DAVAL 36 ASSOCIATES, LLC
-v-
CARLOS CAMPOS LLC d/b/a CARLOS CAMPOS
NEW YORK LLC and CARLOS CAMPOS

And it is further

ORDERED that the branch of the plaintiff's motion seeking summary judgment on the complaint pursuant to CPLR 3212 is granted to the extent that (1) the plaintiff is awarded judgment on the first cause of action in the sum of $385,654.75, and (2) the plaintiff is awarded judgment on the second cause of action in the sum of $136,213.89; and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants, in the sum of $385,654.75 on the first cause of action brought against defendant Carlos Campos LLC d/b/a Carlos Campos New York LLC, and in the sum of $136,213.89 on the second cause of action brought against defendant Carlos Campos, with statutory interest from August 15, 2022; and it is further

ORDERED that the branch of the plaintiff's motion seeking summary judgment on the issue of the defendants' liability for contractual attorneys' fees and expenses is granted, and the plaintiff may submit supplemental papers in support of the application within 30 days of the date of this order, with notice to the Part 42 Clerk of any such filing; and it is further

ORDERED that the branch of the plaintiff's motion seeking to dismiss the defendants' affirmative defenses is granted in its entirety, and the affirmative defenses are dismissed, and it is further

ORDERED that the Clerk shall mark the file to reflect the amendments and enter judgment accordingly.

This constitutes the Decision and Order of the Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

6/12/2023
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE