

**Pearlbud Realty Corp. v Eagle Pedicab Inc.**

2023 NY Slip Op 33449(U)

October 2, 2023

Supreme Court, New York County

Docket Number: Index No. 651133/2022

Judge: Suzanne J. Adams

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART 39TR

Justice

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INDEX NO. 651133/2022

PEARLBUD REALTY CORPORATION,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

EAGLE PEDICAB INC.,KADIR YALCIN

DECISION + ORDER ON MOTION

Defendant.

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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

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

Upon the foregoing documents, it is ordered that plaintiff's motion is granted. Plaintiff, as the landlord of 417 West 44th Street, Ground Floor, New York, New York, entered into a commercial lease with defendant Eagle Pedicab Inc., as tenant, dated June 18, 2019, for a lease term beginning June 24, 2019, through June 30, 2029. Defendant Kadir Yalcin executed a guaranty of the lease on June 24, 2019. Plaintiff commenced this action in March 2022, alleging that the defendant tenant breached the lease by failing to pay rent and other charges beginning in June 2020. Plaintiff now moves pursuant to CPLR 3212 for summary judgment and pursuant to CPLR 3211(b) for dismissal of defendants' affirmative defenses, and for the scheduling of a hearing on plaintiff's attorneys' fees, costs, and expenses. Defendants oppose the motion.

It is well-settled that "the proponent of a summary judgment motion 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. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986) (citing Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985)).

In addition, the party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521 (1<sup>st</sup> Dep't 1989). Summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf*, 153 A.D.2d at 522. Further, the standard of review on a CPLR 3211(b) motion to dismiss an affirmative defense is "whether there is any legal or factual basis for the assertion of the defense." *Matter of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 67 (1<sup>st</sup> Dep't 1988).

Here, viewing the evidence in a light most favorable to the non-moving parties, plaintiff has made a *prima facie* showing of entitlement to summary judgment, and defendants fail to raise factual issues sufficient to defeat the motion. The lease in question was for storage of pedicabs only, and there is nothing in the record indicating that the tenant was unable to use the premises as such, even in light of the Executive Orders issued by the governor during the pandemic. Thus, the doctrines of frustration of purpose or impossibility of performance are inapplicable here. The frustration of purpose doctrine applies where the frustrated purpose was "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1<sup>st</sup> Dep't 2004). *See also, PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1<sup>st</sup> Dept 2011) (frustration of purpose applies "when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract"). The doctrine of impossibility or impracticability generally applies where performance is prevented by "the destruction of the means of performance by an act of God, *vis major*, or by law [citations omitted]." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968). "... [W]here impossibility or difficulty of performance is occasioned only by financial difficulty or

economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused [citations omitted].” *407 E. 61st Garage, Inc.*, 23 N.Y.2d at 281.

Furthermore, defendants do not dispute the amounts cited by plaintiff as due and owing under the lease per the Tenant Ledger, Exhibit B to the moving papers. Defendant guarantor’s affidavit states that defendants never sublet the premises, but there is no proffer of evidence that raises a factual issue regarding the \$16,500 charge on November 15, 2022, for “Unit Violations Income – for illegal occupancy” set forth on the Tenant Ledger. Finally, not only would the Guaranty Law not apply to the circumstances herein (*i.e.*, the premises was not a non-essential retail establishment forced to close for a certain time period during the pandemic), but the law itself was held to be unconstitutional by a Federal court in New York, which held that the Guaranty Law violates the Contracts Clause. *See Melendez v. City of New York*, 2023 WL 2746183 (S.D.N.Y. March 31, 2023). Although the Appellate Division has yet to rule on the Guaranty Law’s constitutionality, the reasoning in *Melendez* has already been adopted by the Supreme Court. *See Kensington House NY LLC v. Nicholas Emil Accardi* (Sup. Ct., New York County, May 17, 2023, Bluth, J., Index No. 651365/2022); *see also Robert T. Iannucci et ano. v. Prime Four Inc. d/b/a Forno Rosso, et al.* (Sup. Ct. Kings County, July 27, 2023, Boddie, J., Index No. 527321/2021). This court agrees that the reasoning in *Melendez* is thorough and sound, and should apply to the instant action.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted in its entirety; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Pearlbud Realty Corporation and against defendants Eagle Pedicab Inc. and Kadir Yalcin, jointly and severally, in the amount of \$ \$496,603.46, with interest thereon at the statutory rate from today’s date through the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements as

taxed by the Clerk, and attorneys' fees as determined by a Special Referee as set forth hereinbelow; and it is further

ORDERED that the amount of attorneys' fees to be assessed as against defendants is referred for determination to a Special Referee, and that within 60 days from the date of this order plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) to arrange a date for a reference to determine pursuant to CPLR § 4317(b); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in accordance with the aforesaid award of damages with interest, costs, and disbursements, and the report of the Special Referee, without any further application.

This constitutes the decision and order of the court.

<u>10/2/2023</u> DATE	<hr style="width: 100%; border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> SUZANNE J. ADAMS, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE