

Trinity Ctr. LLC v Mazel Reproduction, Inc.

2023 NY Slip Op 34300(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 655087/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

to landlord for unpaid monies, plus consequential damages arising from the breach of the lease and reasonable attorney's fees.

After April 30, 2020, the parties entered into a month-to-month tenancy, upon the same terms as the amended lease.

In its complaint, plaintiff alleges that after it delivered its rent bills to Mazel for October to December 2020, Mazel failed to pay the bills pursuant to the terms of the amended lease. On December 21, 2020, plaintiff served a seven-day Notice of Default upon Mazel calling for a cure of the default. After Mazel's failure to pay, plaintiff served the five-day Notice of Cancellation on June 8, 2021, informing Mazel that the lease was to terminate on June 21, 2021. Mazel purportedly vacated the premises on July 19, 2021. On August 20, 2021, plaintiff commenced this lawsuit against Mazel for breach of the lease. Plaintiff added Gross as a defendant liable for personally guaranteeing the money Mazel owed to plaintiff.

Plaintiff now moves for summary judgment, arguing that there are no issues of fact disputing its right to recovery. It submits copies of the original and the amended lease, rent bills from April 2020 to July 2021, the Default notice and the Termination notice. Plaintiff submits a list of damages from October 1, 2020, to July 19, 2021, the date of Mazel's vacating the premises, which totals \$149,773.32. Plaintiff contends that it is entitled to this sum, along with interest, with other expenses to be further determined.

Defendants' opposition does not dispute Mazel's failure to pay rent for the period of October to December 2020, but offers a defense. Defendants argue that Mazel was being constructively evicted during a period when plaintiff was reconstructing the premises and when the COVID-19 pandemic and New York State lockdown (lockdown) occurred, same severely affected Mazel's business operations. As a result, Mazel claims, it suffered reduced sales and lost profits for several months. Defendants contend that an issue of fact exists as to whether plaintiff's reconstruction, the unforeseen COVID pandemic and resulting lockdown were factors which provided Mazel a legitimate reason for not paying rent. Defendants aver that because of these conditions, the lease could not be enforced in its standard manner.

Beginning in November 2000, plaintiff's renovation of the premises led to it occupying a third of the premises leased to Mazel. Without Mazel's permission, plaintiff installed a wall that cordoned off one-third of Mazel's premises for plaintiff's own use, thus depriving Mazel of its use and enjoyment of the premises. Defendants claim this was a constructive eviction.

According to defendants, the lockdown frustrated the purpose of the lease and rendered impossible Mazel's business operations. Designated by New York State as a "non-essential" business, Mazel was forced to suspend its business and stop paying rent. Defendants argue that Mazel is entitled to an abatement of rent from March 7, 2020, the date that New York State issued its Executive Order 202. Defendants also argue that Gross is entitled to an abatement of his personal guaranty to pay rent.

Defendants refer to their answer, which contains several affirmative defenses, such as frustration of purpose, impossibility, temporary impracticality, and force majeure, each related to

the unforeseen pandemic and the lockdown. The answer also asserts various counterclaims. Defendants are seeking reformation of the lease to reflect the parties' intent that Mazel has no obligation to pay rent after March 7, 2020; a declaratory judgment that Mazel is entitled to a rent abatement; a declaratory judgment that the Notice of Default and the Notice of Cancellation are void; an order that plaintiff's claims are barred due to its renovations which created a constructive eviction; and, that plaintiff's actions leading to Mazel vacating the premises constituted an unlawful harassment of defendants. In sum, defendants argue that summary judgment cannot be granted as long there are matters that a trier of fact must determine. They contend that conditions affecting Mazel are too complex and extreme to be disregarded or minimized.

In reply, plaintiff cites several decisions which reject claims by commercial tenants that a disruption of business activity by the COVID-19 pandemic and the lockdown form a basis for a frustration of purpose or impossibility defense. Plaintiff argues that such a situation does not excuse defaults in rent payments. Plaintiff also argues that the lease expressly precludes the constructive eviction defense in the event of such actions as defendants allege, and as a result, Mazel is not entitled to a set-off or reduction of rent. Furthermore, plaintiff contends that the lease expressly provides for the entitlement of reasonable attorney's fees in the event of a lawsuit brought by plaintiff.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Services*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Id.* at 82).

Plaintiff has made out a case for summary judgment by providing evidence in the form of the original and amended leases, the Notice of Default, and the Notice of Cancellation. In order to oppose plaintiff, defendants are obligated to provide evidence raising an issue of fact precluding the granting of the motion. Defendants provide as evidence circumstances which allegedly raise such an issue, asserting a constructive eviction; frustration of purpose; and impossibility, conditions which could bar the enforcement of an otherwise valid lease or agreement.

A commercial tenant may be relieved of his obligation to pay the full amount of the rent due where it has been actually or constructively evicted from either the whole or part of the leasehold (*see Joylaine Realty Co., LLC v Samuel*, 100 AD3d 706 [2d Dept 2012]). A constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises.

Defendants argue that plaintiff, through its actions performed without Mazel's consent, resulted in a partial constructive eviction, where Mazel was deprived of the use and enjoyment of one-third of its leasehold for ten months. Defendants argue that Mazel had a right not to pay rent due and that, if it is ordered to pay said rent, it is entitled to an abatement of rent given plaintiff's actions.

In its reply, plaintiff cites Article 4, Repairs, in the original lease, which provides as follows:

“[T] here should be no allowance to the Tenant [Mazel] for the diminution of rental value and no liability on the part of the Owner [plaintiff] by reason of inconvenience, annoyance or injury arising from Owner, Tenant or others, making or failing to make any repairs, alterations, additions, or improvements in or to any portion of the building including the erection or operation of any crane, derrick or sidewalk shed, or in the demised premises, or the fixtures, appurtenances, or equipment thereof. It is specifically agreed that Tenant shall not be entitled in any set off or reduction of rent by reason of any failure of Owner to comply with the covenants of this or any other article of the lease. Tenant agrees that Tenant's sole remedy at law in such instance will be by way of an action for such damages for breach of contract.”

Plaintiff also cites Article 12 of the original lease, which provides in part:

“Owner shall have the right, at any time, without the same constituting an eviction and without incurring liability to Tenant thereof, to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, stairs, toilets or other public parts of the building”

Plaintiff contends that its actions were covered under the terms of the lease and that the lease expressly precludes defendants from seeking a rent abatement under these circumstances. Plaintiff cites to various decisions upholding similar lease provisions that preclude tenants from seeking rent abatements for alleged constructive eviction claims.

Notwithstanding defendants' claim that plaintiff restricted Mazel's use of its leasehold for an extended period, the lease expressly precludes Mazel from attaining any set-off for rent payments under said circumstances. Article 4 of the lease provides Mazel with the sole legal remedy of suing plaintiff for breach of contract. In its answer, defendants' counterclaims include a reformation of the lease, declaratory judgment and damages based on tort and on the violation of sections 22-1005 and 22-902 of the New York City Administrative Code. There is no counterclaim seeking damages based on breach of contract. The court concludes that defendants are precluded from using the constructive eviction defense to avoid paying the rent due, despite plaintiff's actions in creating such a situation. The terms of the lease represent the mutual assent of its parties (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584 [1999]).

Turning next to defendants' arguments relating to COVID-19 defenses, the frustration of purpose doctrine applies when a change in circumstances makes one party's performance

virtually worthless to the other, thereby frustrating the purpose for making the contract. In order to invoke the doctrine, 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 (see *Center for Specialty Care, Inc. v CSS Acquisition I, LLC*, 185 AD3d 34, 42 [1st Dept 2020]).

Defendants argue that due to an unforeseeable pandemic and the imposition of a government lockdown on business activities, Mazel, through no fault of its own, suffered sufficient economic deprivation as to be excused from paying rent due as of October 2020. In reply, plaintiff argues that despite the outcome and the impact on Mazel's business activities, Mazel was not excused from making rent payments.

The court has considered several court decisions involving the COVID-19 crisis. Courts have held that despite the consequences of the pandemic and lockdown on various businesses in this state, reduced revenue, as alleged here, does not excuse a tenant's obligation to pay rent (see *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021]; see also, *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021]). Here, defendants have asserted a conclusory assessment of Mazel's economic situation as a result of the lockdown, lacking in detail. Thus, it is unclear as to how severe Mazel's revenues have been reduced or how disruptive its business has been. Moreover, there was an opportunity for Mazel to complete a Declaration of Hardship, as allowed by New York State during the pandemic which would prevent commercial tenants from being evicted for nonpayment of rent, until August 31, 2021, upon an adequate demonstration of economic hardship directly related to the pandemic. A copy of said Declaration was apparently served upon Mazel along with the Default notice. There is no indication that Mazel acted upon same despite its claim of adverse economic hardship alleged here.

Based on the foregoing, defendants have failed to raise a material issue of fact sufficient to defeat plaintiff's motion for summary judgment, based on frustration of purpose.

Additionally, the law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening government activities, but only if these activities are unforeseeable (see *Kel Kim Corp v Central Mkts.*, 70 NY2d 900, 902 [1987]). As in the case for frustration of purpose, defendants have failed to show that the COVID-19 pandemic rendered its contract impossible such that it would be entitled to this extreme remedy. Therefore, plaintiff is entitled to summary judgment.

Finally, as the lease provides for attorney's fees, this issue shall be referred to a special referee to hear and determine. Accordingly, it is hereby

ORDERED and **ADJUDGED** that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$ \$149,773.32, together with interest at the rate of 9 % per annum from the date of October 1, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that branch of the motion seeking attorney’s fees shall be referred to a special referee to hear and determine; and it is further

ORDERED that within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff Trinity Centre LLC shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as the Clerk of the Court, who shall enter judgment accordingly; it is further

ORDERED that counsel for the plaintiff shall, within twenty (20) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee 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/suptmanh).

This constitutes the decision and order of this court.

December 4, 2023



HON. VERNA L. SAUNDERS, JSC

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