

Durst Pyramid LLC v Silver Cinemas Acquisition Co.

2024 NY Slip Op 30868(U)

March 13, 2024

Supreme Court, New York County

Docket Number: Index No. 656926/2020

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DURST PYRAMID LLC, Plaintiff, - v - SILVER CINEMAS ACQUISITION CO. D/B/A LANDMARK THEATRES, SILVER HOLDCO INC. Defendants.	<table border="0"> <tr> <td style="padding-right: 20px;">INDEX NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">656926/2020</td> </tr> <tr> <td style="padding-right: 20px;">MOTION DATE</td> <td style="border-bottom: 1px solid black; text-align: right;">06/16/2023</td> </tr> <tr> <td style="padding-right: 20px;">MOTION SEQ. NO.</td> <td style="border-bottom: 1px solid black; text-align: right;">004</td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	656926/2020	MOTION DATE	06/16/2023	MOTION SEQ. NO.	004
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 193, 195, 196, 197, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212
 were read on this motion for SUMMARY JUDGMENT and DISCONTINUANCE.

Plaintiff Durst Pyramid LLC’s (“Plaintiff”) renewed motion for partial summary judgment on its Third Cause of Action for a deficiency against Defendant Silver Cinemas Acquisition Co. D/B/A Landmark Theatres (“Tenant”); to discontinue Plaintiff’s remaining causes of action against Tenant and Defendant Silver Holdco Inc. (“Guarantor” and with Tenant “Defendants”); to dismiss Defendants’ Second Counterclaim for a declaration that Guarantor has fulfilled its obligations; and for an award of reasonable costs and attorneys’ fees, is **granted**.

A. Background

Plaintiff and Tenant are parties to a lease (“Lease” [NYSCEF 184]) for a movie theater on 57th Street (“Premises”). In March of 2020, Tenant defaulted under the terms of the Lease and Plaintiff subsequently filed this action against Defendants.

The Court granted Plaintiff summary judgment on its First Cause of Action for rent arrears from March 2020 through September 2020, when Tenant vacated the Premises (*Durst*

Pyramid LLC v Silver Cinemas Acquisition Co., 2022 N.Y. Slip Op. 31958[U], [N.Y. Sup Ct, New York County 2022], *affid*, 222 A.D.3d 431 [1st Dept 2023]). The Court rejected Defendants' arguments that the COVID 19 pandemic excused their obligations under the Lease (*id.*). However, the Court denied summary judgment for liquidated damages exceeding \$46 million because Plaintiff failed to establish that such liquidated damages were proportional to the probable loss (*id.*).

On January 23, 2023, Plaintiff entered into a lease of the Premises with Look Cinemas V, LLC ("Look Lease"). Plaintiff now seeks a damages award in the amount of \$4,665,055.21, representing the amounts incurred in the "Inter-Lease Period" from September 11, 2020, when Tenant vacated the Premises, and January 23, 2023, when the Look Lease was entered. Plaintiff seeks amounts for base rent, real estate tax, fixed expenses, and condenser water under the terms of the Lease. The amount sought is supported by the affidavit and reply affidavit of Collections Manager, Cliff Schuster (NYSCEF 178 and 200). Plaintiff has deducted from its calculations the amount of \$1,329,600.00 recovered from a Letter of Credit.

Plaintiff requests that if, and only if, its motion for summary judgment is granted that Plaintiff be granted leave to discontinue the balance of its claims and that Defendants' remaining counterclaim for a declaratory judgment be dismissed as moot. Defendants primarily object on the ground that Plaintiff does not expressly seek to discontinue its remaining claims with prejudice. Defendants also argue that Plaintiff fails to make a *prima facie* case for its proposed damages award.

In its reply, Plaintiff confirms that it does not object to dismissal with prejudice. Plaintiff also provides the detailed Schuster reply affidavit to address challenges to its damages calculations.

B. Summary Judgment is Granted on Plaintiff's Third Cause of Action

The proponent of a summary judgment motion pursuant to CPLR 3212 “must make a prima facie showing of entitlement to judgment as a matter of law. . .” through evidence in admissible form (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). If a prima facie case is made, the burden shifts to the opponent to demonstrate the existence of a triable issue of material fact (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [citations omitted]).

Although successive motions for summary judgment are disfavored, the Court may entertain “successive motions for summary judgment. . .on the basis of new evidence” and where they will result in “enhanced judicial efficiency” (*Elihu v Nicoleau*, 173 AD3d 578 [1st Dept 2019]). For instance, where a motion is denied because of factual disputes, and those disputes are later resolved, a second summary judgment motion may be appropriate (*Pough v Aegis Prop. Services Corp.*, 186 AD2d 52, 53 [1st Dept 1992]).

Plaintiff entered into the Look Lease after the first summary judgment motion. Plaintiff has now quantified the amount of the claimed deficiency during the Inter-lease Period to an amount that is both “readily ascertainable” and not “disproportionate” to the actual losses suffered (*VII MP Miami Hotel Owner, LLC v Hycroft, LLC*, 206 AD3d 507, 508 [1st Dept 2022]). As established through the detailed Schuster affidavits and associated exhibits, Plaintiff's calculations were completed using the same methodology that was used in preparing billing statements during the active period of the Lease. Defendants' argument that Plaintiff failed to demonstrate a *prima facie* case is unpersuasive (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]), and Defendants have not rebutted that *prima facie* case.

C. Plaintiffs Motion for a Discontinuance and to Dismiss Defendants' Second Counterclaim is Granted

The Court has broad discretion to grant a discontinuance, and impose conditions, pursuant to CPLR 3217(b) when the defendant will not suffer prejudice (*Eugenia VI Venture Holdings, Ltd. v Maplewood Equity Partners, L.P.*, 38 AD3d 264, 265 [1st Dept 2007]). The Court can require that the discontinuance be with prejudice in appropriate circumstances (*NBN Broadcasting, Inc. v Sheridan Broadcasting Networks, Inc.*, 240 AD2d 319, 319 [1st Dept 1997]). As Plaintiff does not oppose that its remaining claims be discontinued with prejudice, and because Defendants' Second Counterclaim for a declaratory judgment is rendered moot as a result, the motion to discontinue the Second and Fourth Causes of Action and to dismiss the Second Counterclaim is granted.

D. The Plaintiff May Apply for Attorney's Fees

Section 32.13 of the Lease provides that "the prevailing party shall recover its reasonable attorneys' fees, disbursements and court costs from the other party. . ." Plaintiff is the prevailing party in this action and may apply for costs and fees before a final judgment is entered.

* * * *

Accordingly, it is

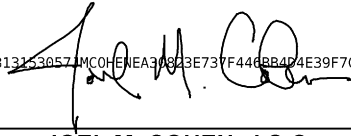
ORDERED that Plaintiff's motion for partial summary judgment on its Third Cause of Action is **GRANTED**; it is further

ORDERED that Plaintiff's motion to discontinue its remaining causes of action is **GRANTED** and Plaintiff's Second and Fourth Causes of Action are **DISCONTINUED WITH PREJUDICE**; it is further

ORDERED that Plaintiff's motion to dismiss Defendants' Second Counterclaim is **GRANTED** and the Second Counterclaim is **DISMISSED WITH PREJUDICE**; it is further

ORDERED that Plaintiff, as the prevailing party, may apply for reasonable costs and attorney’s fees and submit a proposed judgment on notice within ten (10) days and that Defendants shall submit opposition and any proposed counter-judgment within seven (7) days thereafter. The parties are encouraged to agree to a form of judgment without prejudice to any appellate rights as to substantive issues.

This constitutes the decision and order of the Court.


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JOEL M. COHEN, J.S.C.

3/13/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: